FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 87

TAMPA ELECTRIC COMPANY, PETITIONER,

v.

NASHVILLE COAL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Sixth Circuit		
Appendix to Appellant's brief consisting of proceedings transpiring in the United States District Court for the Middle District of Tennessee	A	A
Docket entries	1	1
Complaint	5	4
Exhibit "A"—Agreement dated May 23, 1955 between Potter Towing Company and Tampa Electric Company	9	7
Exhibit "B"—Supplement of September 21, 1955 to above agreement	18	14
Exhibit "C"—Agreement of amendment of contract made on February 8, 1956 between Nashville Coal Company and Tampa Electric Company	22	17
Answer	25	19
Exhibit 1—Excerpts from agreement of merger	29	22

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 16, 1960

	Original	Print
Appendix to Appellant's brief consisting of proceedings transpiring in the United States District Court for the Middle District of Tennessee—Continued		
Motion for summary judgment by defendants	30	23
Affidavit of R. R. Kramer in support of motion	33	24
Exhibit "A"—Purchase order from Tampa Electric Company	35	26
Cross-motion for summary judgment by plaintiff	37	28
Affidavit of William C. MacInnes in support of plaintiff's cross-motion for summary judgment	40	29
Exhibit "A"—Letter dated April 23, 1958 from Peabody Coal Company to Tampa Electric Company	44	33
Supplementary affidavit of Charles H. Schwaner in support of plaintiff's cross-motion for summary judgment	55	42
Excerpts from defendants' reply memorandum	57	43
Opinion, Miller, J., granting defendants' motion for summary judgment and denying plaintiff's cross-motion for summary judgment	58	44
Final Judgment	74	56
Notice of appeal	77	56
Appendix to appellees' brief consisting of additional proceedings in the United States District Court for the Middle District of Tennessee	79	60
Excerpts from plaintiff's memorandum	80	61
Excerpt from defendants' memorandum	80	61
Excerpt from defendants' reply memorandum	81	62
Excerpt from defendants' supplemental reply memorandum	82	62
Argument and submission of cause	83	63
Judgment	84	64
Opinion, Miller, J.	85	64
Dissenting opinion, Weick, J.	94	74
Clerk's certificate (omitted in printing)	111	92
Order allowing certiorari	112	92

[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,775

TAMPA ELECTRIC COMPANY, Appellant,

—v.—

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Appendix to Appellant's Brief—Filed January 15, 1959

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
Nashville Division

Civil Action No. 2418

TAMPA ELECTRIC COMPANY, Plaintiff,

—v.—

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, Defendants.

DOCKET ENTRIES

9- 3-57 Complaint filed, with attached "Exhibit A"; and Affidavit filed.

9- 4-57 Summons issued: Two copies of summons & one copy of Complaint & Exhibit to be served on Hooper Love, statutory agent for deft., West Kentucky Coal Company. Two copies of summons & one copy of Complaint & Exhibit to be served on John J. Teague, statutory agent for deft., Nashville Coal Company, Inc. Original & two copies of Summons (One copy certified), Certified copy of Complaint & Exhibit, original of Affidavit, attested copy of Court Order of 9-4-57, Atty. Keeble's $2.00 Check payable to Sec. State, to be served on Secretary of State [fol. 2] of Tennessee for deft., Nashville Coal Company. (All above listed proceedings delivered to U. S. Marshal).

9- 4-57 Order entered, directing and setting the time within which the defendant Nashville Coal Co. shall file its defense.

9- 6-57 Summons for Nashville Coal, Inc., returned executed and filed. MFE $2.00.

9- 6-57, Summons for Nashville Coal Co. returned by U. S. Marshal showing service made on Secretary of State. MFE $2.00. (Rct. for $2.00 for Sec. State attached)

9- 6-57 Summons for West Kentucky Coal Co. returned executed and filed. MFE $2.50.

9-10-57 Summons for Nashville Coal Co. with Sec. of State's Return, with certification of service, upon Nashville Coal Co., c/o Mark E. Eastin, Jr. West Ky. Coal Co., Madisonville, Ky., along with affidavit of Sec. State and Registered Receipt Card,—filed.

9-20-57 Order entered directing the defendants' time be extended to and including to & including Oct. 7, 1957, to file its defense.

10- 7-57 *Answer of the Defendants, filed, (with attached exhibit "1") (Certificate of Service attached.)

4-25-58 Motion filed by plaintiff to put cause on Pretrial Docket, and

4-25-58 Grounds (brief) for plaintiff's Motion to place the above cause on Pretrial, with letter of service.

5-13-58 *Order entered, placing this cause on the Pretrial Docket. (Attested copy of same mailed to all counsel of record)

[fol. 3]

6- 6-58 *Defendants' Motion for Summary Judgment, & Affidavit of R. R. Kramer with attached Exhibit—A;—filed. (Certificate of Service attached)

6- 6-58 *Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment,—filed. (Certificate of Service attached)

7-11-58 Notice of Cross-Motion filed by Plaintiff's, certificate of service attached.

7-11-58 Plaintiff's Cross-Motion for Summary Judgment filed, certificate of service attached.

7-11-58 Affidavit of William C. MacInnes, exhibit "A" attached.

7-11-58 Memorandum of points and authorities in support of Plaintiff's Cross Motion for summary judgment and in opposition to defendant's motion for summary judgment.

7-30-58 Defendant's Reply Memorandum on the Motion and Cross-Motion for Summary Judgment, filed.

8-11-58 Transcript of a Portion of the Proceedings, before the Court, on Motions, on July 31, 1958,—filed. (Ribbon copy to Atty. Sims)

8-11-58 Transcript of the Proceedings, on Motions before the Court, on July 31, 1958,—filed. (Ribbon Copy & carbon copy to Atty. Keeble)

8-13-58 Plaintiff's Reply Memorandum on the Motion and Cross-Motion for Summary Judgment, with certificate of service attached,—filed.

8-13-58 Supplementary Affidavit of Charles H. Schwaner, with certificate of service attached,—filed.

[fol. 4]

8-14-58 Defendants' Supplemental Reply Memorandum, —filed.

9-25-58 O. C. R.'s Stenotype notes filed of motion heard before Judge Wm. E. Miller July 31, 1958.

11-18-58 *Opinion of the Court—entered. Defendant's Motion for a Summary Judgment should be sustained and the Plaintiff's similar Motion overruled (Attested copy of Opinion mailed to all counsel of record)

12- 4-58 *Order of Final Judgment, entered. Ordering that: (1) The Contract of May 23, 1955, as supplemented & amended between Pltf. & the Defts. is in violation of Sec. 3 of the Clayton Act, 15 U. S. C. Sec. 14, (2) By reason of aforesaid violation of the Clayton Act, said contract is

illegal, void and unenforceable. (3) Plaintiff has no cause of action and is entitled to no relief, against any or all of the defendants on account of the repudiation of said contract, etc. (4) Plaintiff's complaint for declaratory judgment and this action be & they are hereby finally dismissed on the merits and with prejudice. (5) Defendants are entitled to have and recover from plaintiff their costs in this action & to have execution therefor. (Order signed by all counsel of record and photostatic copy of Order mailed to all counsel of record)

12-15-58 *Notice of Appeal—filed by the Plaintiff, Tampa Electric Co. (Certificate of Service attached.)

12-15-58 *Bond for Costs on Appeal—filed by the Plaintiff, Tampa Electric Company.

12-16-58 Record on Appeal forwarded to U. S. Court of Appeals for the Sixth Circuit, Cincinnati, Ohio

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[fol. 5]

IN UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

COMPLAINT—Filed September 3, 1957

1. This is an action for a declaratory judgment, pursuant to Section 2201 of Title 28 of the United States Code, and is brought because there is an actual controversy now existing between the parties to the above entitled action as to which the plaintiff seeks the judgment of this Court.

2. Plaintiff is a corporation organized and existing under the laws of Florida.

3. Defendant, Nashville Coal Company, was organized under the laws of Tennessee in June 1936.

4. On June 18, 1956, its sole stockholder, defendant Nashville Coal Inc., voted to surrender the Nashville Coal Company's charter and dissolve said corporation. The certificate of dissolution, to be effective as of June 30, 1956, was forwarded to the Tennessee Secretary of State on June 23, 1956 and recorded on December 14, 1956.

[fol. 6] 5. Defendant, Nashville Coal Inc. is a corporation organized and existing under the laws of Kentucky, is duly qualified to do business in Tennessee, is the sole stockholder of defendant Nashville Coal Company and received by conveyance all of the real and personal property of Nashville Coal Company subsequent to the latter's dissolution.

6. Defendant, West Kentucky Coal Company, is a corporation organized and existing under the laws of New Jersey and is duly qualified to do business in Tennessee.

7. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

8. Plaintiff is engaged in the business of producing and selling electric energy in and about the City of Tampa, Florida. On or about the 23rd day of May, 1955, plaintiff and a partnership known as Potter Towing Company, composed of David K. Wilson and Justin Potter, entered into a contract providing for the sale and delivery to plaintiff of all of the coal required by plaintiff for the production of electric energy at a new plant it was constructing near Tampa, Florida, for a period of 20 years upon terms and conditions set forth in the said contract, a copy of which is annexed hereto and marked Exhibit "A".

9. Thereafter, said David K. Wilson and Justin Potter assigned or otherwise transferred said contract to Potter Towing Company, Inc., a corporation organized under the laws of Tennessee, and thereafter, said Potter Towing Company, Inc. merged with Nashville Coal Company, one of the defendants herein, and said Nashville Coal Company assumed all the rights and obligations of Potter Towing [fol. 7] Company, a partnership, and Potter Towing Company, Inc., a corporation, under said contract.

10. On or about the 21st day of September, 1955, the defendant, West Kentucky Coal Company, guaranteed plaintiff in writing against any loss or damage arising out of non-performance of said contract dated May 23, 1955. A copy of said agreement of guaranty is annexed hereto and marked Exhibit "B".

11. On or about the 8th day of February, 1956, said agreement dated May 23, 1955 was amended. A copy of said amendment is annexed hereto and marked Exhibit "C".

12. Under the terms of said contract, dated May 23, 1955, it was provided that the defendant would begin making deliveries of coal in or about March 1957.

13. Defendant, Nashville Coal Company, has failed and refused to deliver any coal under said contract but, on the contrary, has repudiated the same, and has asserted that said contract is invalid and unlawful on the ground that the said contract is violative of Section 3 of the Clayton, Act, 38 Stat. 731; USC Title 15, Sec. 14.

14. Plaintiff contends that said contract is in all respects valid and lawful.

Wherefore, plaintiff prays judgment declaring:

1. That said contract dated May 23, 1955 is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms.

2. That such further relief against the above named defendants, or any of them, based on such declaratory [fol. 8] judgment, as may be necessary or proper, be granted plaintiff after reasonable notice and hearing.

3. That plaintiff recover the costs of this action.

Hooker, Keeble, Dodson & Harris, By S/ David M. Keeble, A Member of the Firm, Attorneys for Tampa Electric Company, Office and Post Office Address, 1106 Nashville Trust Building, Nashville 3, Tennessee.

Filed: Sept. 3, 1957.

[fol. 9] EXHIBIT A ANNEXED TO COMPLAINT

THIS AGREEMENT, made and entered into this 23rd day of May, 1955 by and between POTTER TOWING COMPANY, a Tennessee partnership of David K. Wilson and Justin Potter (Hereinafter called "Seller") and the TAMPA ELECTRIC COMPANY (Hereinafter called "Buyer") a corporation organized and existing under and by virtue of the laws of the State of Florida.

WITNESSETH THAT:

WHEREAS, Seller proposes to make available for sale to Buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, or its equivalent: Equivalent quality means equally satisfactory for the use of TAMPA ELECTRIC COMPANY.

WHEREAS, Buyer desires to purchase certain coal for use in its plant to be constructed near Tampa, upon the terms and conditions hereinafter set forth:

NOW, THEREFORE, in consideration of the premises and the covenants and agreements hereinafter contained, it is agreed between Buyer and Seller as follows:

ARTICLE 1—Quantities

Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs addi-
[fol. 10] tional units in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be

exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed. The size of the coal delivered hereunder shall be washed 3" x 0 or smaller.

Notwithstanding the above, Buyer at its option and upon six (6) months' notice to Seller of its intention so to do, may reduce the quantity of coal it will accept from the Seller by fifteen percent provided such reductions are occasioned by the desire of the Buyer to use some by-product as a fuel which would be supplied by some local customer of the Buyer.

ARTICLE 2—Quality

Seller hereby represents that the washed coal 3" x 0 or smaller to be furnished to the Buyer shall have a B.T.U. content of 11,800 as received at the point of sampling and analyzing. The Bureau of Mine procedure for sampling and analyzing shall be adopted as the standard procedure for sampling and analyzing under the terms of this agreement and in the event of a change in this system during the term of this agreement, the standard procedure for analyzing and sampling shall change accordingly.

[fol. 11] It is agreed that the quality of the coal delivered hereunder may vary by one and one-half percent up or down from 11,800 B.T.U. It is further agreed that the Buyer shall sample and analyze all deliveries hereunder and if the coal sampled and analyzed is more or less than one and one-half percent above or below 11,800 B.T.U.'s as received, the price shall be adjusted accordingly, ie. In the event the quality of the coal delivered is less than 11,623 or more than 11,977 B.T.U.'s as received, the price shall be adjusted on the basis of the number of B.T.U.'s per pound. The starting point for reductions in price shall be 11,623 B.T.U.'s as received and the starting point for a bonus shall be 11,977 B.T.U.'s as received.

At any time Seller may request that a reputable independent commercial laboratory agreeable to both parties

be employed to verify sampling and analyzing of the coal delivered hereunder. In the event the determinations of the independent laboratory chosen are within ¾ of 1 percent of the determinations of the analyses of the Buyer, the Seller shall pay the charges for the services rendered by the independent laboratory. In the event the determinations of the independent laboratory vary by more than ¾ of 1 percent from the determinations made by the Buyer, then the Buyer shall pay for the service rendered by the independent laboratory. When secured the analysis of the independent laboratory shall govern settlements between the parties.

ARTICLE 3—Delivery, shipments and weights.

Shipments of coal shall be made in approximately equal monthly amounts to correspond with annual requirements of Buyer. Seller agrees to keep a minimum [fol. 12] of 40,000 to 50,000 tons of coal in storage or transit for the protection of the Buyer. All coal shall be delivered and title thereto shall pass to the Buyer, on Buyer's dock. Seller having full control and complete responsibility for all transportation from mine to delivery point.

Payment for coal delivered hereunder shall be based on destination weights and these weights shall be determined by water displacement of barge or barges. The Seller shall have the right to check such deliveries and in the event of a discrepancy an average of the weights determined by the Buyer and the Seller shall be used as the correct weight for invoicing purposes. The ton of coal as used in this agreement means 2,000 pounds.

Buyer is to maintain proper and adequate dock facility and proper channel depth at all times and to promptly remove coal from docks so as not to delay Seller's unloading.

ARTICLE 4—Price

Buyer will pay to Seller for all coal delivered hereunder at the unloading point of the Seller at Plant Gannon a base price of $6.85 per ton. Seller agrees to credit Buyer with 45¢ for each ton of return cargo acceptable to the

Seller and obtained by it for transportation from Tampa Bay to destination more than one half of the distance by water to Uniontown, Kentucky, up to the number of tons of coal delivered by Seller to Buyer.

Seller agrees and guarantees that Buyer shall receive a minimum credit of 30¢ per ton at all times. However, a full credit of 45¢ per ton shall be guaranteed for eighteen months beginning at time of first delivery or until Unit #2 is installed, whichever date is earlier.

[fol. 13] (A) Escallation

For the first five years of this agreement the base price for purposes of escallation shall be $6.85 per ton. No escallation shall apply between May 23, 1955 and the time of the start of the contract in 1957. Escallation shall be on labor and supplies only. 40% of the price shall constitute cost of labor. 17% of the price shall constitute cost of materials and supplies. All escallation shall be based on the average weekly gross earnings of production workers in manufacturing industry in current dollars as published in the Monthly Labor Review of U. S. Department of Labor, Table C 3. The actual index base shall be the index as of the month in which first deliveries are made in 1957. The price of coal delivered hereunder will vary up or down 57/100 of 1% for each 1% change in the above index.

For purposes of escallation, the determinations shall be made quarterly beginning the first of the quarter following the month in which first deliveries are made. The price determined at any period after adjustment for escallation shall be the price which shall be used for the ensuing three month period.

It is agreed that the total effect of escallation shall not exceed 32¢ per ton in each of the four consecutive five year periods except that in the event of war the effect of escallation shall not be limited. At the end of each five year period the price in ef- [fol. 14] fect, ie, the base price plus or minus adjustment, for escallation shall be the agreed base price for purposes of escallation for the ensuing five year term.

(B) Taxes

Transportation or Toll Tax if applicable shall be added to the price. If, after the date of first deliveries, any new or special taxes not now contemplated are added, then the price is to be adjusted accordingly. This will not include income taxes, excess profit taxes, property tax or capital stock franchise.

ARTICLE 5—Billing

Seller shall bill the Buyer not later than the 10th day and Buyer shall pay said billing not later than the 20th day of each month for coal delivered hereunder during the preceding calendar month.

ARTICLE 6—Force Majeure

If because of force majeure either party hereto is unable to carry out any of its obligations under this agreement, and if such party promptly gives to the other party hereto notice of such force majeure, then the obligations of the party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance, provided the effect of such force majeure is eliminated insofar as possible with all reasonable dispatch. Any deficiencies in deliveries of coal hereunder caused by force majeure shall not be made up except by mutual consent.

[fol. 15] The term "force majeure" as used herein shall mean any causes beyond the control of the party affected thereby, such as acts of God, acts of the public enemy, insurrections, riots, strikes, labor disputes, labor or material shortages, fires, explosions, floods, breakdowns of or damage to plants, equipment or facilities, accidents of navigation, faults in the coal seams, interruptions to transportation, river freeze-ups, embargoes, orders or acts of civil or military authority, or other causes of a similar nature including scheduled outages for inspections and/or maintenance which wholly or party prevent the mining, delivering and/or loading of the coal by the producer thereof or by Seller, or the receiving, transporting and/or delivering of the coal by the carrier of the coal, or the accepting, utilizing and/or unloading of the coal by Purchaser.

ARTICLE 7—Arbitration

Any controversy or claim arising out of or relating to this contract, or breach of this contract, shall be settled by arbitration, in accordance with the rules, then prevailing, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

ARTICLE 8—Term

The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer.

ARTICLE 9—Adjustment for Gross Inequities

Any gross inequity that may result from unusual economic conditions not contemplated by the parties at the [fol. 16] time of execution of this contract may be corrected by mutual agreement or arbitration; provided, however, that nothing contained herein shall be construed as relieving seller from the obligation to continue the delivery of coal and the Buyer to receive and pay for coal as provided under this contract, notwithstanding the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto. Each party shall in case of a claim of gross inequity furnish the other with whatever documentary evidence may be requested in effecting such settlement.

This agreement is made in good faith by both parties under the present laws and contemplates the possibility of changes in present laws and therefore the possibilities of adjustments that will have to be made to conform with future changes in the law at which time both parties will negotiate in good faith to adjust as necessary.

TAMPA ELECTRIC COMPANY

By W. C. MACINNES
President

Attest:

C. H. SCHWANER
Secretary

POTTER TOWING COMPANY

By JUSTIN POTTER
Partner

Witness:

JOE DAVIS

[fol. 17] The undersigned, Uniontown Coal Mining Company, a Kentucky corporation and Nashville Coal Company, Inc., a Tennessee corporation, in consideration of benefits resulting to each of them by reason of the execution and the performance of the above contract hereby unconditionally guarantee performance of said contract by Potter Towing Company.

IN TESTIMONY WHEREOF the undersigned have caused their respective corporate names and seals to be hereto affixed by their duly elected officers on this the 23rd day of May, 1955.

UNIONTOWN COAL MINING COMPANY

By JUSTIN POTTER
Chairman of the Board

Attest:

FRED S. HAMILTON
Secretary

NASHVILLE COAL COMPANY, INC.

By JUSTIN POTTER
President

Attest:

STUART KNIGHTLY
Secretary

[fol. 18] EXHIBIT B ANNEXED TO COMPLAINT

SUPPLEMENT TO AN AGREEMENT DATED MAY 23, 1955 BETWEEN POTTER TOWING COMPANY, A TENNESSEE PARTNERSHIP OF DAVID K. WILSON AND JUSTIN POTTER, CALLED "SELLER" AND THE TAMPA ELECTRIC COMPANY, A FLORIDA CORPORATION, CALLED "BUYER"

WHEREAS, an agreement dated May 23, 1955 by and between Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, called "Seller", and Tampa Electric Company, called "Buyer", created certain rights and obligations with respect to the sale of coal; and the rights and obligations of the Seller thereto have been transferred to Nashville Coal Company, a Tennessee corporation, as a result of the transfer of said contract from Potter Towing Company, a partnership, to Potter Towing Company, Inc., a Tennessee corporation, and the subsequent merger of said Potter Towing Company, Inc. into said Nashville Coal Company; and

WHEREAS, West Kentucky Coal Company (the wholly owned subsidiary of which, Nashville Coal, Inc., is now the sole owner of the entire capital stock of Nashville Coal Company) has agreed to protect and indemnify Justin Potter and David K. Wilson from any loss or damage arising out of non-performance of said agreement with Tampa Electric Company; and it is desired to make such guarantee a direct obligation to Tampa Electric Company and thus, all parties consenting, to eliminate Justin Potter and David K. Wilson from rights or obligations in the premises.

NOW, THEREFORE, IT IS AGREED:

1. Justin Potter and David K. Wilson shall be relieved of any liability or obligation to Tampa Electric Company [fol. 19] resulting from non-performance of said agreement dated May 23, 1955 with Tampa Electric Company on and after October 1, 1955.

2. On and after October 1, 1955, West Kentucky Coal Company, a New Jersey corporation, shall be liable for any loss or damage to Tampa Electric Company arising

out of non-performance of said coal contract between Potter Towing Company and Tampa Electric Company dated May 23, 1955.

EXECUTED in triplicate this 21st day of September 1955.

JUSTIN POTTER
Justin Potter
DAVID K. WILSON
David K. Wilson
Former partners d/b/a
Potter Towing Company

WEST KENTUCKY COAL COMPANY

By HOOPER LOVE
President

Attest:

U. W. POWELL
Secretary

TAMPA ELECTRIC COMPANY

By W. C. MACINNES
President

Attest:

C. H. SCHWANER
Secretary

[fol. 20] STATE OF KENTUCKY
COUNTY OF UNION

Personally appeared before me DARYL F. BATES, a Notary Public in and for said County and State, the within named Justin Potter and David K. Wilson, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

WITNESS my hand and official seal at Uniontown, Kentucky, this 21st day of September 1955.

DARYL F. BATES
Notary Public
My commission expires: July 1, 1957

STATE OF KENTUCKY
COUNTY OF HOPKINS

Before me, ETHELYN O'NEAL, a Notary Public within and for the State and County aforesaid, personally appeared Hooper Love and Urey W. Powell, with whom I am personally acquainted and who upon their several oaths acknowledged themselves to be the President and Secretary respectively of West Kentucky Coal Company, a corporation, and that they as such President and Secretary, being authorized so to do, executed the foregoing instrument for the purpose therein contained by signing the name of the corporation by the said Hooper Love as such President and attesting the same by the said Urey W. Powell as such Secretary.

WITNESS my hand and official seal at office at Madisonville, Kentucky, on this the 21st day of September 1955.

ETHELYN O'NEAL

.....
Notary Public

[fol. 21] STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, G. B. HENDERSON, a Notary Public within and for the State and County aforesaid, personally appeared W. C. MacInnes, and C. H. Schwaner, with whom I am personally acquainted and who upon their several oaths acknowledged themselves to be the President and Secretary respectively of Tampa Electric Company, a corporation, and that they as such President and Secretary, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by the said W. C. MacInnes as such President and attesting the same by the said C. H. Schwaner as such Secretary.

WITNESS my hand and official seal at office at Tampa, Florida, on this the 27th day of September 1955.

G. B. HENDERSON
Notary Public
My commission expires:
Notary Public State of Florida at Large
My commission expires Oct. 19, 1957

[fol. 22] EXHIBIT C ANNEXED TO COMPLAINT

THIS AGREEMENT of amendment of contract made and entered into on this, the 8th day of February, 1956, by and between NASHVILLE COAL COMPANY, party of the first part, hereinafter called the "Seller" and TAMPA ELECTRIC COMPANY, party of the second part, hereinafter called the "Buyer".

WITNESSETH: that

WHEREAS, Potter Towing Company and Tampa Electric Company entered into a certain coal sale contract and agreement dated May 23, 1955, and

WHEREAS, Potter Towing Company assigned said coal sale contract and agreement dated May 23, 1955, together with all of its rights, titles and obligations arising thereunder and incident thereto to Nashville Coal Company, all with the consent and agreement of Tampa Electric Company, and

WHEREAS, a mutually satisfactory arrangement has been agreed upon between the Seller and the Buyer affecting the obligations of each relative to the construction and furnishing of all necessary dock and facilities, including unloading facilities to be placed at Black Point, Plant Gannon site at Tampa, Florida, by both the Buyer and the Seller; and

WHEREAS, the parties do desire to amend and incorporate into said original agreement of May 23, 1955, the following terms and provisions as agreed upon between them;

NOW THEREFORE, in consideration of the premises and covenants and agreements hereinafter contained, the parties do contract and agree as follows:

[fol. 23] 1. The Buyer agrees to construct from the bottom of the bay all necessary mooring facilities, dolphins, platforms, and a dock to the length of 450 feet and support structures therefor, up to but not including the rails upon which the Seller's unloading tower or towers will be placed, also including all necessary access ways thereto, and to rent the same to the Seller for its exclusive use and con-

trol for the contract period at an annual rental or charge equal to 18% of actual initial construction cost, less the sum of $160,000. Said rental to be paid by the Seller to the Buyer quarterly beginning with the date of first delivery of coal hereunder by the Seller, but not in advance quarterly.

2. The Seller agrees at the termination of the contract period to return said facility to the Buyer in as good a condition as received, ordinary wear and tear excepted; to maintain said facility and protect and indemnify the Buyer against any and all claims, losses or liabilities suffered by Buyer, if any, occasioned by Seller's use of said facility, except those resulting or occasioned by the negligence of the Buyer, its agents, servants, or employees.

3. The Seller agrees to construct at its own expense upon such dock facility described in number 1 above all necessary equipment to unload and convey its coal product to the east end of said dock facility and recognizes that this amendment to no extent relieves Seller of its obligations to unload and deliver coal as provided in said original contract of May 23, 1955, provided, however, that at the expiration of the contract period Seller will be and is authorized to remove its said towers, conveyors and other equipment from said dock facility.

[fol. 24] Except as hereinabove amended, said original agreement of May 23, 1955, remains in full force and effect as to all of its terms and provisions as written.

In Testimony Whereof, the parties have hereunto caused their corporate names and seals to be subscribed and affixed by their duly authorized officers on this, the day and date first above written.

Nashville Coal Company

By Mark E. Eastin Jr.

Attest:

U. W. Powell

Tampa Electric Company

By W. C. MacInnes
President

Attest:

C. H. Schwaner
Secretary

[fol. 25]

IN UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

ANSWER—Filed October 10, 1957

Defendants, by their attorneys, answer the complaint herein as follows:

1. Aver that paragraph 1 states only legal conclusions which do not require answer.

2. Admit the allegations of paragraph 2.

3. Admit the allegations of paragraph 3.

4. Admit the allegations of paragraph 4.

5. Admit that Nashville Coal Company, Inc. is a corporation organized and existing under the laws of Kentucky, is duly qualified to do business in Tennessee, and was the sole stockholder of Nashville Coal Company, now dissolved; aver that upon and subsequent to the dissolution, substantially all of the latter's property was transferred to Nashville Coal, Inc.

6. Admit the allegations of paragraph 6.

7. Admit the allegations of paragraph 7.

[fol. 26] 8. Admit the allegations of paragraph 8, but deny that Exhibit A to the complaint effected a lawful, binding or enforceable contract.

9. Admit the allegations of Paragraph 9, but refer to an agreement of merger executed September 10, 1955, particularly Article II, Section 2 thereof, for a statement of the resulting rights and obligations of Nashville Coal Company. A true copy of Article II, Section 2 of the aforementioned agreement of merger is attached hereto as Exhibit 1.

10. Admit that on or about the 21st day of September 1955, West Kentucky Coal Company executed the docu-

ment attached as Exhibit B to the complaint, refer to the terms thereof for a statement of its legal effect, and deny that West Kentucky Coal Company is thereby subjected to any liability to plaintiff.

11. Admit that on or about the 8th day of February 1956, the alleged contract, attached as Exhibit A to the complaint, was purportedly amended by the document attached as Exhibit C to the complaint.

12. Refer to the complete text of the alleged contract for a statement of provisions thereof and otherwise deny the allegations of paragraph 12.

13. Admit that the trustees in dissolution of Nashville Coal Company have refused to deliver any coal under the terms of the alleged contract, attached as Exhibit A to the complaint, and that they and Nashville Coal Company, Inc. and West Kentucky Coal Company have asserted and now assert that the same is invalid and unlawful, on the ground that it violates Section 3 of the Clayton Act. Defendants further assert that the alleged contract is illegal, void and unenforceable in that it con- [fol. 27] travenes Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. Secs. 1, 2; Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730, as amended 49 Stat. 1526, 15 U. S. C. Sec. 13; and Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. Sec. 13a.

14. Deny that the contract is lawful or valid in fact or in law.

15. Deny each and every allegation of the complaint not otherwise admitted, denied, controverted or qualified.

First Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The alleged contract, attached as Exhibit A to the complaint, is illegal, void, and unenforceable by or against

either party, in that, contrary to Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. Secs. 1, 2; and Section 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. Sec. 14, it necessitates the vendee's purchase of its entire coal requirements for a period of twenty years, amounting to hundreds of thousands of tons and millions of dollars per year, from one single seller to the exclusion of all competing sellers.

THIRD AFFIRMATIVE DEFENSE

The alleged contract is illegal, void, and unenforceable by or against either party, in that performance according to its terms, and particularly Article 4 entitled "Price", would violate the provisions of Section 2 of the Clayton [fol. 28] Act, as amended by the Robinson-Patman Act, 38 Stat. 730, as amended 49 Stat. 1526, 15 U. S. C. Sec. 13, and Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. Sec. 13a.

FOURTH AFFIRMATIVE DEFENSE

The action is based on an agreement violative of the Antitrust Laws of the United States and has as its object and effect the accomplishment of illegal ends which would be consummated by the judgment sought.

Wherefore, defendants pray that judgment be entered dismissing the complaint with prejudice and taxing all costs against plaintiff.

Respectfully submitted,

Arnold, Fortas & Porter, 1229–19th Street, N.W., Washington 6, D.C., By s/ Abe Fortas, A Member of the Firm;

Bass, Berry & Sims, 1000 American Trust Building, Nashville 3, Tennessee, By s/ Cecil Sims, A Member of the Firm;

Attorneys for Defendants.

[Certificate of service by Cecil Sims, Attorney, dated Oct. 7, 1957.]

Filed: Oct. 10, 1957.

[fol. 29] EXHIBIT 1 ANNEXED TO ANSWER

AGREEMENT OF MERGER

• • •

ARTICLE II

• • •

2. Upon the merger date all and singular the property, real and personal, and estates and interests therein, leases, leasehold interests, agreements, contracts, debts due on whatever account, things in action, undertakings, rights, powers, franchises, privileges, exemptions, immunities and every other thing of value of the Nashville & Louisville Company, Potter Towing Company, Inc., Miners Coal Company, Uniontown Coal Mining Company, Williams Coal Company and Crescent Coal Company shall automatically vest in the Nashville Coal Company, without any act or deed, and shall thereafter as effectually belong to the Nashville Coal Company, as the successor of the merged corporations, as they did to the said merged corporations. The Nashville Coal Company hereby assumes and hereby shall be responsible for and shall promptly and punctually perform all obligations, liabilities, duties, covenants and conditions of Nashville & Louisville Company, Potter Towing Company, Inc., Miners Coal Company, Uniontown Coal Mining Company, Williams Coal Company and Crescent Coal Company. The Nashville Coal Company shall have the right to make any and all defenses against all claims and demands arising out of such obligations, liabilities, duties, covenants and conditions that the merged corporations might have been entitled to assert in the premises. Nothing herein is intended to enlarge, extend or impair the lien of any indenture, agreement or other instrument executed by any of the parties hereto.

[fol. 30]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS
—Filed June 6, 1958

The defendants, by their attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby move this Court for Summary Judgment in their favor, dismissing the complaint with prejudice, on the following grounds:

1. The admissions of the plaintiff, Tampa Electric Company, of record in this action, as shown by its complaint, and also by a document which plaintiff executed, and which is incorporated as Exhibit A in the Affidavit of R. R. Kramer attached to and filed with this Motion, establish first that there is no genuine issue as to any [fol. 31] material fact; and, second, that on undisputed facts defendants are entitled to judgment as a matter of law, for the reasons stated in the succeeding paragraphs 2 and 3.

2. The complaint alleges that a contract, attached thereto as Exhibit A, "is in all respects valid" and prays a declaratory judgment that the same is a "valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms" (Complaint, pp. 2, 3-4).

3. As a matter of law, for reasons more particularly shown in defendants' Memorandum of Points and Authorities simultaneously filed herewith, the alleged contract is illegal, void, and unenforceable by or against either party, in that, contrary to Section 3 of the Clayton Act (38 Stat. 731, 15 U. S. C. §14) and Sections 1 and 2 of the Sherman Act (26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§1, 2), it necessitates the plaintiff's purchase of its entire coal re-

quirements for a period of twenty years, amounting to hundreds of thousands of tons and millions of dollars per year, from one single seller, to the exclusion of all competing sellers.

Wherefore, defendants pray that final judgment be entered, pursuant to Rule 56 of the Federal Rules of Civil [fol. 32] Procedure, dismissing the complaint with prejudice and taxing all costs against plaintiff.

Respectfully submitted,

Arnold, Fortas & Porter, 1229–19th Street, N.W., Washington 6, D.C., By Abe Fortas, Norman Diamond, Members of the Firm;

Bass, Berry & Sims, 1000 American Trust Building, Nashville 3, Tennessee, By Cecil Sims, A Member of the Firm;

Attorneys for Defendants.

[Certificate of service by Cecil Sims, Attorney, dated June 6, 1958.]

Filed: June 6, 1958.

[fol. 33]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF R. R. KRAMER IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Personally appeared before me the undersigned authority R. R. Kramer who made oath in due form of law that:

(1) His place of residence is 329 Cates Street, Maryville, Tennessee, and that he is the senior member of the law firm of Kramer, Dye, McNabb & Greenwood, which law firm has its offices in the Burwell Building at Knoxville, Tennessee;

(2) The law firm of Kramer, Dye, McNabb & Greenwood is the attorney of record for United Mine Workers of America in a certain civil action styled "Love and Amos Coal Company vs. United Mine Workers of America, et al.," being Civil Action No. 3167 presently pending in [fol. 34] the United States District Court for the Eastern District of Tennessee, Northern Division, and that affiant and E. H. Rayson of said law firm are the active members of said firm in the handling of said Action No. 3167;

(3) In connection with the preparation for trial of said Civil Action No. 3167 the deposition of John H. Amos was taken in Knoxville, Tennessee, on January 8, 1958, and in that deposition Mr. Amos filed as Exhibit 14 to his deposition the paper of which an exact copy is attached as Exhibit-A to this affidavit;

(4) The deposition of said John H. Amos, including the exhibits thereto, was filed in the above-styled Civil Action No. 3167 in the office of the Clerk of the United States District Court for the Eastern District of Tennessee, Northern Division, on January 20, 1958;

(5) Further affiant saith not.

R. R. Kramer, Affiant.

Sworn to and subscribed before me)
this 30th day of May, 1958.)

Grace L. Meek, Notary Public, My commission expires July 21, 1958.

(Seal)

[fol. 35]

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT

PURCHASE ORDER

A Business Managed Taxpaying Utility

from

TAMPA ELECTRIC COMPANY

December 23, 1957

Serving Florida's Center of Activity

No. 18763

IMPORTANT INSTRUCTIONS

1. Place our ORDER NUMBER on all INVOICES, memoranda and PACKAGES.
2. FORWARD INVOICE AND BILL OF LADING PROMPTLY.
3. Prepay all charges on goods purchased F. O. B. destination.

PLEASE RENDER INVOICES IN TRIPLICATE.

We reserve the right to cancel order if shipment is not made as promised.

To Love & Amos Coal Company
P. O. Box 1112
Nashville, Tennessee

Ship to Gannon Station
Bill to Tampa Elec. Co., Purchasing Dept.
P. O. Box 111, Tampa 1, Florida

This replaces our Purchase Order No. 15061 dated August 29, 1957:

[fol. 36] Coal requirements for our Gannon Station approximately as follows:

Year 1958	—	350,000 tons
Year 1959	—	700,000 tons
Year 1960	—	700,000 tons
Year 1961	—	1,000,000 tons

To increase as required to about 2,250,000 tons per year. Coal to have a minimum heat value equal to your Osborne mine coal and to be suitable for firing in our B & W cyclone burners. This order is contingent on a freight rate not to exceed $4.65 per ton.

Price—$4.15 per ton.

Cancellable on 12 months notice by supplier or purchaser. In the event West Kentucky Coal Company should begin to perform under our original contract with Nashville Coal Company this agreement will terminate forthwith.

s/ R. F. Connally
Purchasing Agent

No. 18763

EL
fuel—coal
Our Reg No. 6631, ADJ/VCS

[fol. 37]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

CROSS-MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF —Filed July 11, 1958

The plaintiff, by its attorneys, acting pursuant to Rule 56 of the Rules of Civil Procedure, hereby cross-moves this Court for Summary Judgment in its favor and against the defendants with prejudice on the following grounds:

1. The undisputed allegations of the complaint, the affidavit of William C. MacInnes and the document annexed thereto and incorporated therein attached to and filed with this Cross-Motion, the affidavit of R. R. Kramer and the document annexed thereto and incorporated [fol. 38] therein attached to and filed with the defendants' Motion, establish first, that there is no genuine issue as to any material fact, and second, that on the undisputed facts the plaintiff is entitled to judgment as a matter of law, for the reasons stated in the succeeding paragraphs herein numbered 2 and 3.

2. As a matter of law, for reasons more particularly stated in the plaintiff's Memorandum of Points and Authorities filed herewith, the contract, annexed as Exhibit A to the plaintiff's complaint in this action, is in all respects enforceable and valid and binding upon the plaintiff and the defendants according to its terms.

3. Defendants' affirmative defenses must be stricken as a matter of law, for reasons more particularly stated in the plaintiff's Memorandum of Points and Authorities filed herewith, because the contract does not violate Section 3 of the Clayton Act (Act of October 15, 1914, c. 323, §3; 38 Stat. 731; 15 U. S. C. §14) or Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, §§1, 2, as amended; 26 Stat. 209, as amended; 15 U. S. C. §§1, 2)

in that the contract does not prevent the plaintiff from dealing with the defendants' competitors; in that the contract created competition; and in that the antitrust laws do not apply to a single transaction with a consumer when the seller does not have the power to exert leverage over the purchaser.

Wherefore, the plaintiff prays that final judgment be entered, pursuant to Rule 56 of the Rules of Civil Procedure, granting judgment in favor of the plaintiff and [fol. 39] against the defendants with prejudice and taxing all costs against the defendants.

Respectfully submitted,

Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York 5, New York, By s/ William C. Chanler, a Member of the Firm.

Hooker, Keeble, Dodson & Harris, 1106 Nashville Trust Building, Nashville 3, Tennessee, By s/ David M. Keeble, a Member of the Firm;

Attorneys for the Plaintiff.

Filed: July 11, 1958.

[fol. 40]

AFFIDAVIT OF WILLIAM C. MACINNES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

State of Florida)
County of Hillsborough) ss.:

William C. MacInnes, being duly sworn, deposes and says:

1. I am president of Tampa Electric Company, a member of the Board of Directors of the company and a member of the Executive Committee of the Board of Directors. I am an engineer, having graduated from Massachusetts Institute of Technology in 1927 with a master's degree in electrical engineering and have been actively connected with the electric utility business since 1927. During the

course of the past thirty-one years I have been associated [fol. 41] with various electric utility companies as an officer or director, and am fully familiar with the problems confronting generating plants that utilize coal, oil or gas as fuel.

2. I make this affidavit in support of the plaintiff's motion for summary judgment in the above captioned action and in opposition to the motion of the defendants for summary judgment.

3. Tampa Electric Company is a regulated (investor-owned), electric public utility serving the City of Tampa, Florida, and neighboring communities. The plaintiff is franchised by the municipalities it serves and its operations are regulated by the Florida Railroad and Public Utilities Commission.

4. In 1954 Tampa Electric Company operated two generating plants: the Hookers Point Station and the Peter O. Knight Station. There are five generating units at the Hookers Point Station; at the Peter O. Knight Station there are six generating units. All eleven units are oil burning. I am informed and believe, based on my familiarity with the electric utility business in Florida, that every electric generating installation in peninsular Florida burned oil at that time.

5. In 1954 the Board of Directors of Tampa Electric Company decided to expand the facilities of the company and build a new and additional generating station, to be known as the Francis J. Gannon Station, and ultimately to contain six generating units.

6. On May 23, 1955, Justin Potter signed a contract which provided, among other things, that he would deliver [fol. 42] to Tampa Electric Company sufficient coal to satisfy the operational requirements of two of the units planned for the new power plant, as well as four additional units when, as and if constructed and if Tampa Electric Company determined to burn coal in them, less 15% if Tampa Electric Company utilized any fuel provided by one

of its local customers. On behalf of Tampa Electric Company I agreed, among other things, to accept and pay for the coal. (A copy of the contract is annexed to the plaintiff's complaint as Exhibit A.)

7. The first unit at the Gannon plant commenced operating August 1, 1957; the second unit is nearing completion; the third unit is presently under construction, also as a coal burning unit.

8. I am informed and believe that this contract represented the first time in recent decades that a significant quantity of coal had been sold to any utility in peninsular Florida and that the contract represented also the first time in recent decades that a significant quantity of coal had been sold to any user in peninsular Florida.

9. Because of the demand for electrical energy in the area Tampa Electric Company serves, the unit already operating at Gannon Station is working 24 hours per day, seven days per week. That unit and the other units planned for Gannon Station have a known generating capacity, which capacity requires a quantity of fuel ascertainable in advance to within approximately 5%.

10. Tampa Electric Company is presently considering converting at least two oil burning units at the Hookers Point Station to coal. I annex to this affidavit, as Exhibit [fol. 43] A, a letter and proposed contract of Peabody Coal Company offering coal for use at the Hookers Point Station.

11. During the year 1956 Tampa Electric Company consumed more than 3,100,000 barrels of oil at the Hookers Point and Peter O. Knight Stations. 3,100,000 barrels of oil are equivalent to approximately 825,000 tons of coal of the grade and quantity provided for by the contract involved in this lawsuit. That comparison is derived as follows: The contract provides for coal having a heat content of 11,800 British thermal units (B.t.u.s) per pound or 23,600,000 B.t.u.s per ton. The average heat content of the oil purchased by Tampa Electric Company is 6,275,000

B.t.u.s per barrel. (One cubic foot of natural gas contains an average of 1,000 B.t.u.s of heat, but the only natural gas presently available in the State of Florida is being supplied to utilities and industries in the panhandle of the state.) It is on the basis of heat content that the relative value of fuels is determined.

12. Subsequent to the making of the contract of May 23, 1955, I learned that Justin Potter had sold his interests to the West Kentucky Coal Company, and on September 21, 1955, on behalf of Tampa Electric Company, I made the agreement (Exhibit B annexed to the complaint) accepting West Kentucky Coal Company as a guarantor.

13. For Tampa Electric Company to equip Gannon Station to burn coal has already necessitated a capital expenditure of $3,000,000 more than if the fuel initially chosen had been oil. I am informed and believe that to supply Tampa Electric Company under this contract has required a capital expenditure in excess of $7,500,000 by the defendants and their subsidiaries.

[fol. 44] 14. It was not until April 1957 that Mark Eastin, president of each of the three defendant companies, told me that his companies would not perform under the contract.

/s/ William C. MacInnes

Sworn to before me this)
3 day of July, 1958.)

/s/ John J. Fogarty, Notary Public, State of Florida at Large. My Commission expires April 26, 1960.

Notarial seal

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT

PEABODY COAL COMPANY

GENERAL OFFICES . PEABODY PLAZA . 301 OLIVE STREET
St. Louis 2, Missouri
Telephone Geneva 6-3400

April 23, 1958

Mr. A. D. Jones, Mechanical Engineer
Tampa Electric Company
Tampa, Florida

Dear Mr. Jones:

We are enclosing herewith draft of proposed contract for study and further discussion between us. We are planning to visit you again next week for this purpose.

[fol. 45] Among other things, we wish to discuss the desirability of including in the contract a provision that your company may, within a specified period of time, exercise an option to increase the tonnage by an agreed amount and, if you so desire, to take delivery at other points on Tampa Bay. Incidentally, this could be included in the contract or covered by accompanying letter or supplementary agreement.

Looking forward to seeing you next week, I am,

Yours very truly,

S. L. JEWELL
S. L. Jewell,
Vice President

SLJ:tjt
Enclosures

COAL SUPPLY AGREEMENT

THIS AGREEMENT, entered into this day of , 1958, between TAMPA ELECTRIC COMPANY, a Florida corporation (herein called "Buyer"), and PEABODY COAL COMPANY, an Illinois corporation (herein called "Seller"), witnesseth:

WHEREAS, Buyer desires to purchase from Seller and Seller desires to sell to Buyer, the coal hereinafter specified to be delivered to Buyer for use in its Hooker's Point power plant located on Tampa Bay near Tampa, Florida;

NOW, THEREFORE, in consideration of the foregoing and of the following mutual covenants and agreements of the parties, Seller agrees to sell, and Buyer agrees to pur- [fol. 46] chase, accept and pay for, coal of the quantity and quality hereinafter stated, upon the terms and conditions hereinafter set forth:

1. *Term*: Coal shall be purchased and sold hereunder during the period of twenty (20) years, commencing on the 1st day of May, 1959, unless an earlier or later date is mutually agreed upon.

2. *Source of Coal*: The coal to be delivered hereunder shall be supplied from the Ken Mine of Seller, provided that Seller reserves the right to furnish from other mine or mines located in Western Kentucky coals produced or sold by Seller, upon condition that such coal shall be delivered to Buyer at the same delivered cost per million BTU as if such coal had been delivered from Seller's Ken Mine.

3. *Quantity*: The quantity of coal to be supplied hereunder for the term of this Agreement is 4,000,000 tons, to be sold and delivered to Buyer at the rate of 200,000 tons annually in approximately equal monthly shipments. It is agreed that Buyer shall have the right, upon at least thirty (30) days written notice to Seller, to increase or decrease the quantity of coal to be delivered in any month or months by an amount or amounts which, in the aggregate, shall not exceed ten per cent (10%) of the base quantity for each year of the term of this Agree-

ment, provided that Seller shall not be obligated to deliver in any one month coal of a quantity more than fifteen per cent (15%) in excess of one-twelfth of the tonnage required to be delivered annually.

4. *Delivery*: The coal to be sold and delivered hereunder shall be delivered to Buyer in vessel alongside Buyer's [fol. 47] Hooker's Point Station dock on Tampa Bay and shall be delivered by Seller and accepted by Buyer in substantially equal monthly quantities. For each shipment of coal hereunder, Seller shall promptly mail or cause to be mailed to Buyer, a shipping notice showing weight of the coal shipped and shipping date.

5. *Quality*: The coal to be delivered hereunder shall have an "as received" average calorific value of at least 11,800 BTU's per pound, determined as provided in Section 11 hereof. The size shall be 3" x 0 or smaller.

6. *Base Price*: The Base Price to be paid by Buyer to Seller for coal hereunder shall be $7.316 per ton delivered in vessel alongside Buyer's Hooker's Point Station dock on Tampa Bay.

7. *Base Price Revision*:

(a) The Base Price shall be increased or decreased from time to time to reflect actual changes in Seller's cost per ton of producing and delivering hereunder coal produced at Seller's Ken Mine occurring after the date of this Agreement in the following:

(i) Wage rates, hours of work and conditions of employment (including payments to the Miners' Welfare Fund) under labor union contracts or collective bargaining with employees or labor union representatives;

(ii) Unit cost of materials and supplies;

(iii) Cost of electric power;

(iv) Rates of compensation paid to administrative, supervisory, technical and clerical employees;

[fol. 48] (v) Federal, state and local fees, licenses and taxes (except taxes measured on net income);

(vi) Cost of labor, supplies and fuel required in transportation and delivery.

(b) For the purpose of determining the amounts of the revisions to be made in the Base Price to reflect changes occurring due to items (i), (ii) and (iii) of Section 7(a), it is agreed that the following table which correctly sets forth the percentages of the original Base Price for the various items stated, shall be the basis for settlement:

(i) Cost of mine labor under labor union contracts or collective bargaining agreements	12.2%
(ii) Cost of mine material and supplies	8.7%
(iii) Cost of electric power	1.2%

(c) Buyer and Seller shall jointly determine changes in the Base Price to reflect increases or decreases in the cost of labor, supplies and fuel required in the transportation and delivery of the coal hereunder.

(d) The Base Price shall also be revised from time to time to compensate for the effects of inflation and/or deflation on Seller's profit per ton (meaning the average profit per ton after all costs and expenses, except federal, state or local taxes imposed on or measured by net income), as follows:

(i) Each revision shall be computed from changes in the Consumers Price Index (as issued by the [fol. 49] United States Department of Labor, Bureau of Labor Statistics) on the adjusted base that the average cost of all items therein for the years 1947 through 1949 equalled 100;

(ii) The index number for all items in said Index for April 1958 shall be used as the basis for computing the amount of any such revision;

(iii) To the extent and after said index increases more than twenty-five per cent (25%) above or decreases more than twenty-five per cent (25%) below said index number for April 1958, the said Base Price shall be revised to compensate for the effect thereof upon the purchasing power of Seller's profit per ton;

(iv) The first twenty-five per cent (25%) of such increase or decrease above or below said index number for April 1958 shall not be considered in computing the amount of any such revision of the said Base Price, and any such revision shall continue in effect only so long as said index continues to be more or less than twenty-five per cent (25%) above or below said index number for April 1958, as the case may be.

(e) When a change occurs in any of the items of cost referred to in this Section 7, the amount of the revision to be made in the Base Price by reason of such change shall be determined as promptly as possible, and shall be made retroactive to the date of such change in costs. Seller shall submit to Buyer all data reasonably required to establish the amount of change in cost per ton to the [fol. 50] Ken Mine of Seller of producing and delivering coal hereunder, and the parties agree to meet promptly and negotiate in good faith with respect to any change in price requested by either Buyer or Seller on account of any such change in cost.

(f) Notwithstanding that coal may be delivered from time to time from other mines, under the provisions of Section 2, revisions of the Base Price shall be based upon costs of production at Seller's Ken Mine.

8. The Base Price for coal furnished hereunder is based upon coal having a calorific value of 11,800 BTU's per pound, as received at Buyer's plant. Whenever the weighted average calorific value of all coal delivered hereunder during any calendar month is in excess of 11,900 BTU's per pound, or is below 11,700 BTU's per pound,

the Base Price shall be subject to adjustment each month so that the actual price per ton shall be greater or less than the Base Price in the same proportion that the weighted average calorific value of such coal bears to calorific value of 11,800 BTU's per pound.

The weighted average calorific value per pound of the coal delivered hereunder during each month shall be computed from the weights determined under paragraph 10 and from the sampling and analysis determined under paragraph 11.

9. *Billing and Payment*: On or before the fifteenth (15th) day of each calendar month Seller shall render to Buyer an invoice for all coal delivered hereunder by Seller during the preceding calendar month. Buyer shall, within fifteen (15) days after receipt of each invoice, pay to Seller, the net amount of the invoice. In the event a [fol. 51] revision of the Base Price is required but has not been ascertained at the time of preparation of the invoice, the billing shall be done on the tentative basis of the then existing Base Price, and as soon as possible after the revised Base Price is determined, an appropriate adjustment shall be made between Buyer and Seller.

10. *Weights*: The weights of the coal delivered and billed shall be determined by Buyer on continuous belt conveyor scales or other satisfactory weighing devices at plant of Buyer. Buyer shall promptly advise Seller at the end of each calendar month as to the weight of coal delivered by Buyer during that month.

Seller shall have the right to have a representative present at any and all times to observe the weighing of coal delivered hereunder at the plant of Buyer, and to test, or to have tested, Buyer's scales. If such tests show Buyer's scales to be in error, they shall be adjusted to an accurate condition.

11. *Sampling and Analyses*: For the purpose of ascertaining the calorific value of coal delivered hereunder, Buyer shall take from each shipment of coal received, before it is commingled with other coal, representative

samples of the coal and determine by proper analyses its calorific value. In the event Seller shall question either the sampling or analyses made by Buyer, Seller shall have the right to have samples taken and analyzed by a commercial testing laboratory, and the results of such sampling and analyses shall be binding upon both Buyer and Seller.

12. *Force Majeure*: If because of force majeure either Seller or Buyer is unable to carry out its obligations under [fol. 52] this Agreement (other than obligations of such party to pay or expend money for or in connection with the performance of this Agreement), and if such party promptly gives to the other party concerned written notice of such force majeure, then the obligations of the party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance, provided the effect of such force majeure is eliminated in so far as possible with all reasonable dispatch. Any deficiencies in deliveries of coal under this Agreement which are caused by force majeure shall be made up by Seller as soon as practicable after the termination of the emergency caused by such force majeure, except to the extent, if any, that Buyer was required to and did purchase other coal in order to maintain its plant in operation during such emergency.

The term "force majeure" as used herein shall mean any unforseeable causes beyond the control and without fault or negligence of the party affected thereby, such as acts of God, acts of the public enemy, insurrections, riots, labor disputes, labor or material shortages, fires, explosions, floods, breakdowns of or damage to plants, equipment or facilities, interruptions to transportation, embargoes, orders or acts of civil or military authority, or other causes of a similar nature which wholly or partly prevent the mining, loading and/or delivering of the coal by Seller, or the accepting, unloading and/or utilizing of the coal by Buyer.

13. *Demurrage*: It is agreed that Buyer shall have thirty-six (36) hours free time after vessel or barge is secured alongside Buyer's dock for unloading vessels or

barges containing 10,000 net tons or less. After such free [fol. 53] time, Buyer will pay demurrage charges at the usual and customary rates in effect in the Tampa Bay area.

14. *Price Limitation*: In the event the price of coal is fixed by law at any time hereafter and such fixed price conflicts with any price or prices specified in this Agreement, then the parties hereto shall join in a petition to the proper governmental authority and shall exert all reasonable efforts in support of such petition to have this Agreement declared exempt from such law and/or to have such price or prices specified in this Agreement approved.

15. *Notices*: All notices under this Agreement shall be in writing addressed to the party to be so notified and delivered in person to its President or Vice President, or sent by certified or registered mail addressed to such party at its business office or at any such other address of which either party may notify the other in writing.

16. *Waivers and Remedies*: The failure of either Buyer or Seller to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

No default of any party to this Agreement in the performance of any of its covenants or obligations hereunder, which except for this provision would be the legal basis for rescission or termination of this Agreement by any other party hereto, shall give or result in such a right unless and until the party committing such default shall fail to correct the default within sixty (60) days after written notice of claim of such default and a statement setting forth the nature thereof is given to such defaulting party by the party claiming such default.

[fol. 54] 17. *Successors and Assigns*: This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns; but this

Agreement may not be assigned by Buyer without the written consent of Seller, nor by Seller without the written consent of Buyer, except that either Buyer or Seller may, without the consent of the other party, assign this Agreement to a successor to all or substantially all of its property and assets, either by purchase, merger, consolidation or otherwise.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

TAMPA ELECTRIC COMPANY

By .....
(Title)

Witness:

.....

.....

PEABODY COAL COMPANY

By .....
(Title)

Witness:

.....

.....

[fol. 55]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTARY AFFIDAVIT OF CHARLES H. SCHWANER IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

State of Florida)
County of Hillsborough) *ss.:*

Charles H. Schwaner, being duly sworn, deposes and says:

1. I am vice president in charge of finance of Tampa Electric Company.

2. I make this affidavit in support of the plaintiff's cross-motion for summary judgment in the above captioned action and in opposition to the motion of the defendants for summary judgment.

3. This affidavit supplements the affidavit of William C. MacInnes, sworn to on July 3, 1958, and annexed to the plaintiff's moving papers filed in this action. Mr. MacInnes is presently out of the state.

[fol. 56] 4. The fuel oil used by the eleven units at the Hookers Point and Peter O. Knight Stations is supplied by the Gulf Oil Corporation. Since the filing of Mr. MacInnes' said affidavit, Gulf Oil Corporation has offered to reduce its oil price to Tampa Electric Company by seven cents per barrel and to place a ceiling on price escalation. This offer was made for the avowed purpose of inducing Tampa Electric Company to refrain from converting oil burning units to coal and accepting the offer of Peabody Coal Company referred to in the said affidavit of Mr. MacInnes. Tampa Electric Company is presently considering this offer, together with the offer of Peabody Coal Company.

5. In addition, the Atomic Energy Commission has approved the application of Tampa Electric Company and

others to build an atomic reactor. It is planned that electricity generated by fissionable fuel will be on the lines of Tampa Electric Company by 1964.

CHARLES H. SCHWANER

Sworn to before me this 7) day of August, 1958:)

John J. Fogarty, Notary Public State of Florida at large. My commission expires April 26, 1960.

[Certificate of service by David M. Keeble, Attorney, dated Aug. 13, 1958.]

Filed: Aug. 13, 1958.

[fol. 57]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEFENDANTS' REPLY MEMORANDUM IN THE COURT BELOW

[Page 3, Footnote 3]

"At several places in its memorandum, the plaintiff states that the buyer and seller had 'equivalent bargaining power.' This is clearly not so. The Buyer (plaintiff) had overwhelming power or leverage. It was the only large coal consumer in the area, and the Seller was faced with intense competition in the depressed coal industry."

* * * * * * *

[Pages 4-5]

* * * * * * *

"The Seller did not occupy a dominant position in the business of producing or selling coal. On the contrary, according to the plaintiff, there are over 700 coal producers who produce coal suitable for its requirements * * *".

* * * * * * *

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
Civil Action No. 2418

TAMPA ELECTRIC COMPANY, Plaintiff,

—v.—

NASHVILLE COAL COMPANY, ET AL., Defendants.

OPINION OF MILLER, DISTRICT JUDGE, GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT—November 18, 1958

Received for Entry 11:15 A. M.
Nov. 18 1958
JOHN O. ANDERSON, Clerk
By FRANK WILLIAMS D. C.

This is an action for a declaratory judgment seeking to establish that a certain contract referred to as the Potter-Tampa contract is valid and enforceable and binding upon both the plaintiff and the defendants.

The defendants, hereinafter sometimes referred to as the Seller, have moved the Court for summary judgment, contending that there are no issues of fact to be decided by the Court, and that the undisputed facts establish the [fol. 59] illegality of the contract under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The plaintiff, Tampa Electric Company, hereinafter sometimes referred to as the Buyer, has also moved for summary judgment, insisting that the Potter-Tampa contract upon the basis of the undisputed facts is valid and enforceable. The Buyer is a large electric utility company serving Tampa, Florida, and its metropolitan area. Prior to the Potter-Tampa contract, oil was the only fuel used by the

Buyer in its production of electric power. It is at present constructing a new plant or station near Tampa, known as the Gannon Station, which will eventually contain six separate power-producing units. Two of these units have been completed and are using coal as fuel, and a third coal-burning unit is under construction.

The contract in issue was made May 23, 1955 between the Tampa Electric Company and Justin Potter and David K. Wilson, co-partners doing business as the Potter Towing Company. After a series of transfers Nashville Coal Company, Inc., a wholly owned subsidiary of West Kentucky Coal Company, succeeded to the Potter-Wilson position under the contract. The West Kentucky Coal Company then made an agreement with Potter and Wilson to indemnify them against any loss resulting from non-performance of the Potter-Tampa contract. After all transfers of the contract had been completed the Seller refused to perform on the ground that it was in violation of the Clayton and Sherman Acts, and subsequently the Buyer filed this action for declaratory judgment.

The terms of the Potter-Tampa contract are substantially as follows: The Seller agrees to provide the Buyer [fol. 60] and the Buyer agrees to purchase from the Seller all the coal required as fuel for the production of electric energy at the Gannon Station for a period of 20 years. The first two units of the plant now in operation will use coal as fuel, and as to these units "the full requirements shall not be less than 225,000 tons of coal per unit per year". It is agreed that a third unit now under construction will also use coal, and that all future units constructed will be supplied by the Seller if the Buyer elects to use coal as fuel. It is further stipulated that two years' notice will be given the Seller as to whether or not coal will be used in future units. The contract price is fixed at a minimum of $6.85, less a minimum rebate of 45 cents per ton for the first eighteen months and 30 cents per ton thereafter. There is no provision in the contract as to other plants now in operation or plants which might be constructed in the future, the contract applying only to the Gannon Station.

It is estimated by the Buyer that within a very few years the Gannon Station will consume more coal than is presently consumed in the entire State of Florida. Peninsular Florida's present coal consumption is approximately 700,000 tons per year as compared to the 450,000 tons required by the Potter-Tampa contract as a minimum for the first two units at the Gannon Station. The Buyer is presently purchasing coal for the first two units from Love and Amos Coal Company under a contract which is subject to cancellation on twelve months' notice by the Buyer, or subject to immediate cancellation should the Seller begin to perform under the Potter-Tampa contract.

[fol. 61] It is the contention of the Seller that the Potter-Tampa contract is invalid under Section 3 of the Clayton Act in that it is an agreement or understanding not to purchase the product of the Seller's competitors and as such its effect is to substantially lessen competition. The relevant provisions of Section 3 are as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

To sustain the validity of the contract the Buyer insists, first, that the Potter-Tampa contract does not fall within the scope of Section 3 in that it does not have the effect of requiring that the purchaser shall not use the goods of a competitor of the Seller. In support of this argument it is pointed out that the Buyer, consistently with the Potter-Tampa contract, may use oil as a fuel in the remaining three units at the Gannon Station, and that it may use the coal of a competitor of the Seller in any

future plant to be constructed and in any present oil-[fol. 62] burning plant converted to the use of coal. However, in the present case the Court is persuaded that the Potter-Tampa contract is a requirements contract having the effect of requiring the Buyer not to use the goods of a competitor of the Seller within the intent and meaning of Section 3. It clearly provides, in effect, that the Buyer must buy only from the Seller all of its coal for the two units now in operation and for the additional unit now under construction at the Gannon Station, representing in fact all of the Buyer's present coal requirements. According to the Buyer's estimation, it will require 1,000,000 tons of coal per year at the Gannon Station by 1961. A contract to supply the total coal requirements of an operation of such magnitude for such a protracted exclusionary period clearly falls within the purview of the statute. The question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. It is true that coal could conceivably be used in future plants or by converting existing plants, but there is no evidence that this is presently planned. While the possibilities suggested do exist the unalterable fact remains that the contract at issue is one which "pre-empts" or "engrosses" all of the known coal requirements of the Buyer—manifestly a large and substantial volume of commerce—for a period of 20 years.

This conclusion as to the effect of the contract under the Clayton Act is supported by the decision of the Supreme Court in International Salt Co., Inc. v. United States, 332 U. S. 392, 60 S. Ct. 12, 92 L. Ed. 20, in which the International Salt Company required tying arrangements wherein the lessees of its patented machines could use only [fol. 63] salt purchased from the lessor. In the year 1944 the company sold approximately 119,000 tons of salt for about $500,000 for use in its leased machines. The tying clause in practically all of its leases required the lessee to purchase from the lessor all unpatented salt and salt tablets consumed in the leased machines. The Government moved for summary judgment which was sustained by the trial court. On appeal the International Salt Company insisted that summary judgment was unauthorized because it pre-

cluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. In rejecting this argument and in holding that the tying agreements were illegal the Court stated:

> "We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, per se, United States v. Socony-Vacuum Oil Co., 310 U. S. 150; United States v. Trenton Potteries Co., 273 U. S. 392, but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which 'tend to create a monopoly', and it is immaterial that the tendency is a creeping one rather than one that pro-[fol. 64] ceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." (332 U. S. p. 396)

It was regarded as immaterial by the Court that the leases provided that if competitors offered salt of an equal grade at a lower price the lessee should be free to buy in the open market unless the lessor would furnish the salt at an equal price, and further that the lessee was entitled to any benefit of any general price reduction in the lessor's salt tablets. It was found that these provisions, while affording some measure of protection to the lessee, did not avoid "the stifling effect of the agreement on competition". Thus the decision would appear to stand for the proposition that a violation of Section 3 occurs if a substantial amount of business is removed from the area of competition even though there remains the possibility of use of a competitor's product.

Other decisions are to the same effect, i.e., that the possibility that a buyer might use a competitor's product does not exempt exclusive contractual arrangements from

the condemnation of the Clayton Act. Judson L. Thomson Mfg. Co. v. Federal Trade Commission, 1st Cir. 150 F. 2d 952, cert. denied, 326 U. S. 776, 66 S. Ct. 267, 90 L. Ed. 469; Signode Steel Strapping Co. v. Federal Trade Commission, 4 Cir. 132 F. 2d 48. The case of Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746, relied on by the Buyer, is deemed to be distinguishable because the lease involved left the buyer "free to buy wherever he chooses", or "to discontinue any or all" dealings with the Seller, whereas in the present case the Buyer is committed for a period of 20 [fol. 65] years to purchase from one Seller alone all coal consumed at one of its major plants.

The undisputed facts establish that the Gannon Plant's coal requirements will soon exceed in fuel equivalent all of the oil burned at the Buyer's other two plants. It is estimated that after 1961 the Buyer's coal requirements will increase as required to about 2,250,000 tons per year. Under the terms of the Potter-Tampa contract the Seller, alone, would have the opportunity to furnish this large amount of coal to the Buyer.

The Buyer's argument that the Potter-Tampa contract is not a requirements contract because coal competes with other fuel is not only contrary to the express language of Section 3, but it is also untenable when the decisions construing Section 3 are considered. It is true that oil is the fuel used in all plants operated by the Buyer other than the Gannon Station, and that oil could be used in the last three units to be built at the Gannon Station. But this fact becomes immaterial in view of the express language of Section 3 that an exclusionary agreement is unlawful where its effect may be to substantially lessen competition "in any line of commerce".

Although both oil and coal are fuels, each is a separate and distinct line of commerce. Thus it was held in George Van Camp & Sons Co. v. American Can Company, et al., 273 U. S. 245, 253, 49 S. Ct. 112, 73 L. Ed. 311, with reference to another section of the Clayton Act using identical language:

"The phrase is comprehensive and means that if the forbidden effect or tendency is produced in one

out of all the various lines of commerce the words 'in any line of commerce' literally are satisfied."

[fol. 66] And in United States v. E. I. du Pont de Nemours & Co., et al., 353 U. S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057, the Supreme Court in ruling that automotive finishes and fabrics were a separate line of commerce from other similar materials, stated:

"* * * automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act."

The Buyer further argues that the Potter-Tampa contract not only did not stifle or lessen competition but actually stimulated or increased it by introducing coal to Peninsular Florida and breaking the oil monopoly. It is pointed out that on the basis of the most recent figures at the time the contract was entered into coal accounted for less than 6 per cent of the fuel consumed in the entire state of Florida, and that every power-generating unit in Peninsular Florida burned oil in its boilers. It is said that discounting the Panhandle of Florida where all of the natural gas is consumed Peninsular Florida has been monopolized by oil. It is further argued that until coal was first burned in the units at Gannon Station a year ago there was virtually no challenge to oil's stranglehold in Peninsular Florida, and that this contract therefore, created competition where none had existed before. Conceding that coal is a newcomer to the Florida market and that its use by the Tampa Electric Company might stimulate the market and induce other consumers to convert to coal, the Court is of the opinion that this possibility does not save the contract [fol. 67] in issue from illegality under Section 3 of the Clayton Act. Inquiries of this kind were expressly rejected as irrelevant in Standard Oil Company of California, et al. v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. In that case the Standard Oil Company had made numerous contracts with independent dealers to

supply their full requirements for certain "Standard" products for a period of six months. There was no evidence that competition had actually decreased, but the Court held that Section 3 of the Clayton Act did not require such proof in order to establish a violation of its terms. In this connection it was stated:

> "* * * To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out * * *" (337 U. S. p. 311)

The Court then concluded:

> "We conclude, therefore, that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such [fol. 68] contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of Section 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity" (337 U. S. p. 314).

A similar situation exists in the present case, there being no direct evidence that competition would actually decrease as a result of performance of the contract. It is conceivable that competition might increase due to the introduction of a product into a comparatively new market. But the inescapable fact persists that the Potter-

Tampa contract for a period of 20 years excludes competitors of the Seller from a substantial amount of trade, although as the plaintiff asserts, the Seller was only one of 700 coal producers who could serve the same market. The contract is exclusionary to such a degree and the volume of commerce affected is manifestly so large that there is no escape from the conclusion that its effect under the circumstances disclosed is to "probably lessen competition or create an actual tendency to monopoly", to use the words of the Supreme Court in Standard Fashion Company v. Magrane-Houston Co., 258 U. S. 346, 357, 42 S. Ct. 360, 66 L. Ed. 653, language re-approved in Standard Oil Company of California v. United States, supra.

One reason for rejecting the argument in Standard Oil that actual lessening of competition must be shown was [fol. 69] the difficulty which the courts would encounter in adopting a proper standard of proof for such cases. It was observed that "to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts."

It is vigorously argued by the plaintiff that the Clayton Act does not apply to a requirements contract when the seller does not occupy a sufficiently powerful position in the market to enable him to assert "leverage" over the buyer. This argument is stated in the plaintiff's brief as follows:

> "Even assuming that the contract at issue required plaintiff to purchase all of its fuel requirements from the defendants for a period of twenty years there is nothing in the anti-trust laws themselves nor in any case construing them which would outlaw the contract. It is abundantly clear from an examination of the legislative history of Section 3 of the Clayton Act as well as the cases applying that section to so-called 'requirements contracts', that the sole evil sought to be prohibited was a practice, very prevalent when

the Clayton Act was adopted in 1914, whereby a seller who, by means of the economic leverage arising from a patent or from substantial economic control of a unique and desirable article, tied up a substantial portion of the retail or manufacturing market by requiring retail dealers or manufacturers who wished to deal in [fol. 70] his particular goods or utilize his patent to agree not to deal in the goods of a competitor. Clearly the contract here in issue bears no resemblance whatever to such agreements."

But here also it would appear that the plaintiff's argument is repelled by the decision in Standard Oil Company of California, supra. In referring to market dominance the court in that case held that the requirements contracts violated Section 3, even though:

"• • • Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find • • •". (337 U. S. p. 302)

Times-Picayune Publishing Co. et al. v. United States, 345 U. S. 594, 73 S. Ct. 872, 97 L. Ed. 1277, held that both proof of dominance in the market for the tying product and a showing that an appreciable volume of business in the tied product is restrained are essential conditions to judicial condemnation of a tying clause as a per se violation of the Sherman Act. But in the same case the court made it clear in its opinion that under the narrower standards of Section 3 of the Clayton Act either proof of market dominance or proof of restraint of a substantial volume of commerce would suffice to establish a violation. Thus, the court stated:

"From the 'tying' cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolis- [fol. 71] tic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the

narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred." (345 U. S. p. 608)

The same distinction between the Sherman Act and the more limited and particularized provisions of the Clayton Act is to be borne in mind in considering Northern Pacific Railway Co., et al. v. United States, 356 U. S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545. The language of the court with respect to monopoly power or market dominance or control is limited to the facts of the case before the Court involving a tying agreement which was alleged to constitute an unreasonable restraint of trade under the general provisions of Section 1 of the Sherman Act. A Section 3 Clayton Act violation was neither claimed nor considered.

The wording of the statute itself lends no support to the argument that economic leverage or market dominance is a prerequisite to its violation and for this reason the effort to rely upon the legislative history of the Clayton Act would appear to be futile. The Court is of the opinion that the rationale of the court in Standard Fashion Company v. Magrane-Houston Co., supra, is applicable. In that case the court, in speaking of the legislative history of the Clayton Act, stated:

> "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of [fol. 72] this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." (258 U. S. p. 356)

Nor is there any merit in the plaintiff's contention that the Clayton Act applies only to instances where numerous contracts with various dealers are involved and not to a case of a single seller and a single buyer. This position is not sustained by authority and no support can be found for it in the language or the purpose of the statute. Both

language and purpose would be ignored if multiple buyers or sellers were held to be necessary to its violation.

The final contention of the plaintiff that Section 3 should not be applied where the buyer desires that the contract be performed is also without substance. The illegality of the contract under Section 3 renders it unenforceable at the suit of either party. In National Transformer Corp., et al. v. France Mfg. Co., 6 Cir. 215 F. 2d 343, 361, the court said:

> "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in pari delicto, the law will leave them where it finds them, and all relief is refused because of the public interest * * *. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong * * *. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

[fol. 73] It may be conceded that there are doubtless economic benefits inherent in the use of a requirements contract of this type, and that it seems somewhat harsh to invalidate such a contract, particularly when entered into by the parties of their own free will, in the evident belief that it was mutually advantageous, and without compulsion or constraint. But the Court's function is not to determine whether the contract is advantageous or desirable from the standpoint of the parties or of the public but whether it is legal. Under the circumstances of this record the two essential conditions are shown to invalidate the contract under Section 3 of the Clayton Act regardless of its merits or beneficial effects otherwise: First, the contract within the sense and meaning of Section 3 is one requiring the buyer not to use or deal in the goods of a competitor of the seller; and Second, the effect of the contract is to substantially lessen competition in a line of commerce. Since the Court is of the view that the contract is so condemned, its status under the Sherman Act need not be determined.

As the material facts shown by the pleadings, affidavits, and other pertinent papers, are not in dispute and no genuine issue of fact is involved, it follows that the defendant's motion for a summary judgment should be sustained and the plaintiff's similar motion overruled.

An appropriate form of judgment will be passed to the Court to implement this opinion declaring the rights of the parties accordingly.

William E. Miller, United States District Judge.

[fol. 74]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil Action No. 2418

TAMPA ELECTRIC COMPANY, Plaintiff,

v.

NASHVILLE COAL COMPANY, et al., Defendants.

FINAL JUDGMENT—December 4, 1958

Received for Entry 9:15 AM
Dec 4 1958

John O. Anderson, Clerk
By Frank Williams

The complaint in this action having prayed for a judgment declaring that a certain described contract for the sale of goods to plaintiff, entered into on May 23, 1955, and thereafter supplemented and amended on September 21, 1955 and February 8, 1956, in respect of which the

defendants had succeeded to the rights and obligations of the original seller, "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, according to its terms"; and

[fol. 75] Defendants having filed their answer, alleging that the said contract "is illegal, void and unenforceable", due to its violation of the antitrust laws of the United States, and praying that the complaint be dismissed with prejudice; and

A motion and cross-motion for summary judgment under Rule 56, together with supporting affidavits and memoranda of law, having been respectively filed by defendants and plaintiff, wherein the parties asserted and agreed that there was no genuine issue between them as to any material fact; and

Oral argument on said motions having been heard by the Court on July 31, 1958, following which additional memoranda were filed by both parties and an additional affidavit was filed by plaintiff; and

The Court having considered all pleadings, affidavits and memoranda filed herein, and having found from the parties' undisputed allegations of fact, and their uncontroverted sworn statements of fact, and also from their admissions of fact (including admissions of fact disclosed in their memoranda), that there is no genuine issue between them as to any material fact and no disputed or controversial question of fact to be submitted for trial; and

The Court having decided, upon the basis of the findings of fact and conclusions of law set forth in its opinion, filed herein November 18, 1958, that defendants are entitled to judgment as a matter of law;

It is hereby ordered, declared, adjudged and decreed:

1. The contract of May 23, 1955, as supplemented and amended, between the plaintiff, an original party thereto, and the defendants, as successors to the rights and obliga-
[fol. 76] tions thereunder of Justin Potter and David K. Wilson, co-partners doing business as Potter Towing Com-

pany, is in violation of Section 3 of the Act of Congress approved October 15, 1914, commonly known as the Clayton Act, 15 U. S. C. §14, in that, within the meaning of that Act, it requires a purchaser of goods not to use or deal in the goods of a competitor of the seller and has the effect of substantially lessening competition in a line of commerce.

2. By reason of its aforesaid violation of the Clayton Act, said contract is illegal, void and unenforceable.

3. Plaintiff has no cause of action, and is entitled to no relief, against any or all of the defendants on account of the repudiation of said contract or of the failure, neglect or refusal of any or all of the defendants to perform any acts or undertakings in respect of said contract.

4. Plaintiff's complaint for declaratory judgment and this action be and they are hereby finally dismissed on the merits and with prejudice.

5. Defendants are entitled to have and recover from plaintiff their costs in this action and to have execution therefor.

Wm. E. Miller, United States District Judge.

Entered Dec. 4, 1958.

Consented to as to form:

Winthrop, Stimson, Putnam & Roberts; Hooker, Keeble, Dodson & Harris, Attorneys for Plaintiffs.

Arnold, Fortas & Porter; Bass Berry & Sims, Attorneys for Defendants.

[fol. 77]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed November 15, 1958

Please take notice that Tampa Electric Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from each and every part of the judgment granting defendants' motion for summary judgment and denying plaintiff's cross-motion for [fol. 78] summary judgment entered in this action on December 4, 1958.

Dated: Nashville, Tennessee
December 15, 1958.

Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York 5, New York, By William C. Chanler, A Member of the Firm;

Hooker, Keeble, Dodson & Harris, 1106 Nashville Trust Building, Nashville 3, Tennessee, By David M. Keeble, A Member of the Firm;

Attorneys for the Plaintiff, Tampa Electric Company.

To:

Clerk, United States District Court for the Middle District of Tennessee, Nashville Division, Nashville, Tennessee.

Bass, Berry & Sims, 1000 American Trust Building, Nashville, Tennessee.

Arnold, Fortas & Porter, 1229 19th Street, N.W., Washington 6, D. C.

[fol. 79] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 13,775

TAMPA ELECTRIC COMPANY, Appellant,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division

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Appendix for Appellees—Filed March 6, 1959

[fol. 80]

IN UNITED STATES DISTRICT COURT

APPELLEES' APPENDIX

EXCERPTS FROM PLAINTIFF'S MEMORANDUM IN THE COURT BELOW

[Page 13, Footnote 6]

"In fact, [appellant's oil burning generators] burn the equivalent of almost double the quantity of coal guaranteed by the contract to be supplied to the first two units at the new generating station. In 1956 the 11 oil burning generating units consumed more than 3,100,000 barrels of oil, the equivalent of more than 825,000 tons of coal of the grade and quality involved in the contract at bar."

[Page 49]

* * * * * * *

"Potter was but one of over 700 coal producers capable of serving the plaintiff, and of course, his coal was no more 'unique' or otherwise desirable than that of his competitors."

* * * * * * *

EXCERPT FROM DEFENDANTS' MEMORANDUM IN THE COURT BELOW

[Page 6, Footnote 3]

"According to official statistics, published by the Federal Government, the minimum tonnage stipulated in the Potter-Tampa contract is more than double the total coal consumption of all electric utilities in Florida during the year 1956 (Federal Power Commission, *Electric Power Statistics*, Binder Section 2, Table I of Reports 57-1B to 57-12B, inclusive)."

[fol. 81]

EXCERPT FROM DEFENDANTS' REPLY MEMORANDUM IN THE COURT BELOW

[Page 17, Footnote 14]

"The fierce intensity of the competition that would be foreclosed by the enforcement of the Potter-Tampa contract is revealed by the testimony of Affiant MacInnes ([appellant's] president) in a recent rate proceeding (Florida Railroad and Public Utilities Commission, Docket No. 5724-EU, *Application of Tampa Electric Company for Approval, of Adjustments in its Rates for Electricity* Transcript of February 11, 1958, pp. 79, 90-91):

'Q. Now, have you contacted any other company to see——

A. Coal companies?

Q. Coal companies.

A. We have coal companies in and out of our office so fast that the receptionist doesn't know where to seat them to give them time to talk to people.

• • • • • • •

A. We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things.'"

• • • • • • • •

[fol. 82]

EXCERPT FROM DEFENDANTS' SUPPLEMENTAL REPLY MEMORANDUM IN THE COURT BELOW

[Page 15, Footnote 4]

"In a recent proceeding before the Interstate Commerce Commission, concerning reductions in rail coal rates to Florida, [appellant's] witness testified as follows concerning the size of his company (I. C. C. Docket No. I & S 6825, *In the Matter of Coal—Southern Mines to Tampa, Florida, et al.*, Transcript of 3/11/58, pp. 126-7):

"The Tampa Electric Company serves an area of approximately 1700 square miles, located at the approximate geographical center of the Florida peninsula. Although this area covers only 3 per cent of the total land area of the state of Florida, it is interesting to note that it is over 1½ times as large as the state of Rhode Island. Within the boundaries of this service area, which contains 11 per cent of the population of Florida, lies one of the South's greatest potential industrial areas. For manufacturers interested in export and import, it is worthy of note that the deep water port of Tampa is nearer the Central and South American ports than any other major port in the United States.

The service area of the Tampa Electric Company extends from Tampa Bay eastward 60 miles to the center of the state, and is about 30 miles wide. Contained within this area is the calculated center of population of the entire state. The largest city and the center of industrial activity of the west Florida coast is Tampa. Other communities included in this territory are Port Tampa, Ruskin, Plant City, Dade City, Winter Haven, Oldsmar, Mulberry, Auburndale and Lake Alfred, and about fifty other small communities.'"

[fol. 83]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARGUMENT AND SUBMISSION OF CAUSE—October 7, 1959

Before: Miller, Cecil, and Weick, Circuit Judges.

This cause is argued by William C. Chanlet for appellant and by Abe Fortas for appellees and is submitted to the court.

[fol. 84]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—April 4, 1960

Appeal from the United States District Court for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Shackelford Miller, Jr., United States Circuit Judge.

[fol. 85] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,775

TAMPA ELECTRIC COMPANY, Appellant,

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC., and WEST KENTUCKY COAL COMPANY, Appellees.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINION—April 4, 1960

Before: Miller, Cecil and Weick,* Circuit Judges.

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* On the day of the oral argument of the case in this Court, Judge Weick was a District Judge sitting by designation. He was sworn in as Circuit Judge on the following day.

Miller, Circuit Judge. The appellant, Tampa Electric Company, brought this declaratory judgment action in the District Court, pursuant to Sec. 2201, Title 28, United States Code, for the purpose of having its contract of May 23, 1955, providing for the purchase of coal by it from the appellees, declared valid and enforceable. The appellees contended that the contract was illegal and unenforceable by or against either of the contracting parties, in that it was contrary to Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, *Sections 1, 2 and 14, Title 15, United States Code.* The facts not being in dispute, both the appellant and the appellees moved for summary judgment. The District Judge held that the contract was in violation of Section 3 of the Clayton Act, was therefore illegal and unenforceable, and that the appellant was entitled to no relief against any of the appellees on account [fol. 86] of their refusal to perform under the contract. *Tampa Electric Co.* v. *Nashville Coal Co.*, 168 F. Supp. 456, M. D. Tenn. This appeal followed.

Appellant is an electric public utility serving the city of Tampa, Florida, and neighboring communities. The appellees are engaged in mining and selling coal.

In 1954 appellant operated two integrated generating plants, both located on Tampa Bay, Florida, at which there were eleven generating units, all of which burned oil. In that year, in order to meet the increasing demand for electric energy in its service area, appellant decided to expand its facilities and build a new and additional integrated generating station on Tampa Bay, to be known as the Francis J. Gannon Station, at which it was planned to ultimately install six generating units.

The May 23, 1955, contract was for the purchase of coal for use at the Gannon Station. It was entered into between the appellant as the buyer and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter, as the seller. Subsequent to the making of the contract, the interest of Wilson and Potter was transferred to the appellee Nashville Coal Co. and thereafter to the appellee Nashville Coal, Inc., which is a wholly owned subsidiary of the appellee West Kentucky Coal Company. The West Kentucky Coal Company guaranteed

the appellant in writing against any loss or damage arising out of nonperformance of the contract.

The contract, after stating that the seller proposed to make available for sale to the buyer large quantities of coal from the West Kentucky field near Uniontown, Kentucky, and that the buyer desired to purchase certain coal for its use in its plant to be constructed near Tampa, upon the terms and conditions thereinafter set out, provided as follows:

> "Seller agrees to provide and deliver on the dock or docks of the Buyer at Plant Gannon coal to supply the total requirements of fuel of the Buyer for the operation of its first two units to be installed at the Gannon Station and the Buyer agrees to accept and pay for such fuel as provided in Article 4 hereof, which fuel requirements shall be not less than 225,000 tons of coal per unit per year. It is further agreed that if during the first 10 years of the term of this contract the Buyer constructs additional units in which [fol. 87] coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer. It is understood that the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same. It is anticipated that deliveries will start approximately March, 1957 for the requirements of the first unit and that deliveries for the requirements of Unit #2 will begin when constructed."

It also provided,

> "The term of this agreement shall be for a period of twenty years from the first day of the month in which month first deliveries are made to the Buyer."

The first unit of the Gannon plant commenced operation August 1, 1957; the second unit on October 29, 1958. The

third unit, a coal burning unit, was under construction at the time this action was filed.

For the appellant to equip the Gannon Station to burn coal necessitated a capital expenditure of $3,000,000.00 more than if the fuel initially chosen had been oil. To supply the appellant under this contract required a capital expenditure in excess of $7,500,000.00 by the appellees.

In April, 1957, just before the first coal was to be delivered under the contract, the appellees advised appellant that they would not perform under the contract, which they contended was illegal and unenforceable by either party. As a result, it has been necessary for appellant to purchase its coal requirements in the market at a price substantially higher than that provided for in the contract.

In making such arrangements it estimated that its coal requirements for its Gannon Station were approximately as follows:

Year 1958	350,000 tons
Year 1959	700,000 tons
Year 1960	700,000 tons
Year 1961	1,000,000 tons

"To increase as required to about 2,250,000 tons per year."

At the time the contract was entered into, coal accounted for less than 6% of the fuel consumed in the entire state [fol. 88] of Florida. Every electric generating installation in peninsular Florida burned oil at that time. It was estimated by the buyer that within a very few years the Gannon Station would consume more coal than was presently consumed in the entire state of Florida. Peninsular Florida's coal consumption was approximately 700,000 tons per year.

Section 3 of the Clayton Act provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to • • • contract for sale of goods, • • •, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States • • •, on the condition, agreement, or understanding that

> the * * * purchaser thereof shall not use or deal in the goods, * * *, supplies, or other commodities of a competitor or competitors of the * * * seller, where the effect of such * * * contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appellant's initial contention is that the statutory history of Section 3 shows that the Act was not intended to apply to consumers; that it was intended solely for the purpose of protecting dealers and retailers from certain specific practices whereby powerful sellers, through some form of economic leverage, frequently required them to execute agreements not to deal in a competitor's goods as a condition to the purchase of the seller's goods; and that Congress never contemplated that the Act should prevent a consumer from contracting for the purchase of his requirements of a single commodity, even though the amount was very substantial. In other words, Congress was concerned only with attempts by sellers, who were economically powerful, to restrain competition in the distributive process. The statutory language is not so restrictive. It expressly refers to "*a*" contract for sale "for *use*, consumption or resale." (Emphasis added.) The wording clearly includes a single sales contract for *use or consumption*, as well as multiple sales by sellers to numerous dealers or retailers for resale. There is nothing ambiguous about this language of the statute. Under such circumstances, we do not look to the legislative history of the Act in order to give it a different construction. In [fol. 89] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the Court had under consideration the construction of Section 3 of the Clayton Act. The Court said, "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." To the same effect is *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. (2) 867, 870, C. A. 7th; *George Van*

Camp & Sons v. *American Can Co.*, 278 U. S. 245, 253-254. See also: *Ohio Power Co.* v. *N. L. R. B.*, 176 F. (2) 385, 387, C. A. 6th, cert. denied, 338 U. S. 899; *Mid-Continent Petroleum Corp.* v. *N. L. R. B.*, 204 F. (2) 613, 623, C. A. 6th, cert. denied, 346 U. S. 856.

The statute condemns certain transactions, the effect of which may be to substantially lessen competition or tend to create a monopoly in any line of commerce. A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result. If it does have this result and is otherwise included within the plain wording of the statute, the statute must be construed in accordance with the Congressional purpose. *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-351; *Cornett-Lewis Coal Co.* v. *Commissioner*, 141 F. (2) 1000, 1004, C. A. 6th. In *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 302-305, the Supreme Court held Section 3 of the Act applicable to a situation where the seller did not occupy a dominant economic position in the industry.

Appellant contends that the contract of sale was not entered into "on the condition, agreement, or understanding" that the appellant would not use or deal in the goods of a competitor, which is necessary in order for the statute to be applicable. Concededly, the contract is a "requirements" contract and does not expressly contain the "condition" required by the statute. But, the contract provides for the appellees to supply the appellant its "total requirements" for the first two coal burning units and for such other units at the Gannon Station as would be constructed as coal burning units. The actual result of this contract is to prevent the purchaser from buying any coal for those units from a competitor of the appellees. We [fol. 90] agree with the ruling of the District Judge that the contract is one within the sense and meaning of Section 3 of the Clayton Act, in that it requires the buyer not to use or deal in the goods of a competitor of the seller, irrespective of the absence of the specific words contained in the statute. In *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, and *Anchor Serum Co.* v. *Federal Trade Commission*, supra, 217 F. (2) 867, C. A.

7th, the contracts therein declared illegal were "requirements" contract, which did not contain the unlawful condition in *haec verba*.

The foregoing ruling does not mean that "requirements" contracts are illegal per se. As pointed out in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 306-307, "requirements" contracts may well be of economic advantage to buyers as well as to sellers. The effect of the particular contract under the circumstances of the case is the determining factor. A "requirements" contract of some companies over a short period of time might well avoid the effect proscribed by the statute, while such a contract of large proportions and extending over a long period of years would clearly fall within the provisions of the statute. *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982, N. D. Ill.; *United States* v. *American Can Co.*, 87 F. Supp. 18, 31-32, N. D. Cal.

There is also an important difference between a "requirements" contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. As pointed out in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 867, S. D. Cal., when a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a "requirements" contract for a long period of time this chance is, for all practical purposes, cut off. As stated by the Supreme Court in *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, "It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever [fol. 91] opportunity there might be for competing suppliers to attract his patronage, * * *."

Appellant makes the further contention that Section 3 is not applicable because the contract does not prohibit it from dealing in the goods of a competitor, as required by the Act. It is argued that coal and oil are competitive

fuels, that the contract deals only with the purchase of coal, and that the appellant, as is permitted by the contract, buys oil from various suppliers for its non-coal burning units. It is also pointed out that there is the possibility that existing oil burning units could be converted to coal or that additional coal burning units, not covered by the contract, could be constructed, the coal for which could be purchased from any of appellees' competitors. The argument is a plausible one, but we believe it completely ignores the realities of the situation.

It is true that coal and oil are competitive fuels. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72. But, for the purposes of Section 3 of the Clayton Act, we believe that each is to be treated as a separate, defined subdivision of the fuel industry generally. *George Van Camp & Sons* v. *American Can Co.*, supra, 278 U. S. 245, 253; *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 593-594; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. (2) 764, 766, C. A. 6th. The present contract deals with coal and coal burning units only, and we treat as irrelevant appellant's purchases of oil for its oil burning units in an entirely separate plant at a different location.

At the time the contract was made, there were no coal burning units not covered by the contract. There is nothing to indicate that there is any planned or probable conversion of oil burning units into coal burning units or construction of coal burning units not covered by the contract. The contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller. We agree with the ruling of the District Judge that the question must be decided upon the basis of realities and the contract construed reasonably in the light of existing facts. The remote possibility that a buyer might use a competitor's product is an immaterial factor in the actual picture before the Court. *International Salt Co.* v. *United States*, 6 F. R. D. 302, 307, S. D. N. Y., 332 U. S. 392; *Northern Pacific Railway Co.* v. *United States*, [fol. 92] 356 U. S. 1, 10, footnote 8; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. (2) 952, C. A. 1st, cert. denied, 326 U. S. 776; *Signode Steel Strap-*

ping Co. v. *Federal Trade Commission*, 132 F. (2) 48, C. A. 4th.

As appellant contends, it is not sufficient that the "requirements" contract is one which in substance prohibits the purchaser from dealing in the goods of a competitor of the seller. Under Section 3 such a contract is not invalid unless its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In *International Salt Co.* v. *United States*, supra, 332 U. S. 392, 396, the Court ruled that where the volume of business affected by the contract cannot be said to be insignificant or insubstantial the tendency of the arrangement to accomplishment of monopoly seems obvious, pointing out that it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop. In *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 314, the Court held that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected and that it was the purpose of Section 3 to remove a potential clog on competition wherever, were it to become actual, it would impede a substantial amount of competitive activity. Applying this standard to the present case there is no question but that the effect of the contract will be to substantially lessen competition. At the estimated 1959 rate of consumption, namely 700,000 tons per year, it would about equal peninsular Florida's annual coal consumption prior to the execution of the contract. Using the estimated 1,000,000 tons for 1961 as the average annual purchases during the twenty year life of the contract, the total dollar pre-emption over the life of the contract at the minimum price of $6.40 per ton would amount to $128,000,000.00. This is, of course, not insignificant or insubstantial.

Nor is the case removed from the operation of the Act by the fact that the contract would have overall beneficial results in starting the substantial use of coal in peninsular Florida and thus afford substantial competition to the use of oil. The possible benefits that may result from one particular contract, by reason of the special circumstances applicable to it, cannot override the general policy of the

[fol. 93] Act prohibiting transactions which tend to create a monopoly in any line of commerce. *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. (2) 552, 559, C. A. 4th, cert. denied, 340 U. S. 906; *Standard Oil Co. of California* v. *United States*, supra, 337 U. S. 293, 311-312.

Although the contract is in violation of the statute and therefore illegal, appellant contends that the appellees should not be allowed to take advantage of their own illegal act to relieve themselves of a contract obligation which now appears burdensome. Appellant recognizes the well settled general rule that a court will not lend its assistance in any way towards carrying out the terms of an illegal contract. *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 191 F. 543, 550, C. A. 6th; *National Tranformer Corp.* v. *France Mfg. Co.*, 215 F. (2) 343, 361, C. A. 6th. But, it urges upon us a well recognized exception to this general rule that if the parties are not in *pari delicto* and the undertakings of each are not equally blameworthy, a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent. *Marshall* v. *Lovell*, 19 F. (2) 751, 753-754, C. A. 8th; quoting from *Pomeroy's Equity Judisprudence, 4 Ed. Section 942; Restatement, Contracts, Section 601; 6 Corbin, Contracts, Section 1540 (1951); Ring* v. *Spina*, 148 F. (2) 647, 653, C. A. 2nd; *Allgair* v. *Glenmore Distilleries Co.*, 91 F. Supp. 93, 95-96, S. D. N. Y.; *Hartford-Empire Co.* v. *Glenshaw Glass Co.*, 47 F. Supp. 711, 717, W. D. Pa. Appellant points out that Section 3 of the Clayton Act is directed against the seller; its purpose is to protect the buyer; and that the case falls within the exception.

We think that our decision on this issue is controlled by the recent analysis of the problem by the Supreme Court in *Kelly* v. *Kosuga*, 358 U. S. 516. In that case the Court rejected the defense of illegality in an action under a contract which violated the Sherman Anti-Trust Act, but pointed out that in a restricted class of cases the defense was a valid one. If the contract is of such a nature that a part of it constitutes an intelligible economic transaction in itself and the enforcement of that portion of the contract would not be to enforce a violation of the

Act, then such portion of the contract will be enforced in order to avoid an inequitable result. But, the Court will [fol. 94] not enforce a contract which is illegal under the anti-trust laws of the United States if, in doing so, the Court would be a party to carrying out of one of the very restraints forbidden by the Act. *Kelly* v. *Kosuga*, supra, at page 520; *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, 212 U. S. 227, 261-263. It is immaterial whether the contract was for the benefit of the seller or the buyer. The determining factor is whether the result of the contract had the proscribed effect and this is so, even though the result is a harsh one for one of the parties. *Anchor Serum Co.* v. *Federal Trade Commission*, supra, 217 F. (2) 867, 870, 873, C. A. 7th. The aid of the Court is denied not for the benefit of either of the parties, but because public policy demands that it should be denied without regard to the interests of individual parties. *Continental Wall Paper Co.* v. *Louis Voigt & Sons Co.*, supra, 212 U. S. 227, 262.

The contract in the present case is an executory one. It is not at the present time divisible into an executed portion and an executory portion so as to permit recovery for any portion which may have been performed without ordering a violation of the Act in the future. The appellant is seeking to have declared valid the very provisions which make it invalid. To do so would be to compel the parties to engage in business with each other over a period of twenty years in a manner which the Act declares invalid. The recent decision of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. (2) 29, December 15, 1959, rehearing denied January 12, 1960, is, we believe, distinguishable for the same reasons. Under such circumstances, the Court will not assist either party in its enforcement.

This view of the case makes it unnecessary to consider the effect of Sections 1 and 2 of the Sherman Act.

The judgment is affirmed.

Weick, Circuit Judge, dissenting. It is with reluctance that I have filed this dissenting opinion, particularly in view of the careful consideration which this case has received by the majority and by the District Judge. With

deference to my colleagues, whose views I respect, I am of the opinion that the authorities on which they relied, when applied to the facts of this case, do not compel the [fol. 95] decision which they reached. I think the judgment below has produced a harsh result, not in the contemplation of the Clayton Act, which is being enforced against the wrong party.

The seller[1] has successfully avoided its contractual obligations with the defense that in making the contract of sale it violated the anti-trust laws, § 3 of the Clayton Act (Title 15 U. S. C. § 14). While this defense has been frequently resorted to by buyers in attempting to avoid payment of their indebtedness to sellers, it is, I submit, somewhat unusual for a seller to plead its own violation of the anti-trust laws in asking a court to relieve it of its contractual obligations, particularly since these laws were aimed at sellers and not buyers.

The type of defense availed of here by the seller has not met with favor by the Supreme Court when invoked by a buyer. *Kelly* v. *Kosuga*, 358 U. S. 516, 518 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947); *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1915); 42 *University of Virginia Law Review* 785.

In enacting the anti-trust laws Congress created a right and prescribed the remedy. The remedy of private parties injured by reason of violation of the anti-trust laws is an action for treble damages[2] and injunction.[3] There are also enforcement provisions for injunctive relief in actions by the Federal Trade Commission[4] and the United States.[5]

The remedy provided private parties would seem to be adequate, namely, the recovery of treble damages and an

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[1] For the purposes of this opinion appellant will be referred to as Tampa or buyer and appellee as seller.

[2] Title 15 U. S. C. § 15.

[3] Title 15 U. S. C. § 26.

[4] Title 15 U. S. C. § 21.

[5] Title 15 U. S. C. § 25.

injunction to stop the illegal practices. In any event, the statutory remedy is all that Congress provided. Congress could have vitiated contracts made in violation of the Clayton Act. It did not do so.

The provisions of the Clayton Act are materially different from Section 1 of the Sherman Act. The Sherman Act is directed to "every contract . . . in restraint of [fol. 96] trade or commerce . . . is declared to be illegal." 15 U. S. C. 1. The Clayton Act is directed against the person. It provides: ". . . It shall be unlawful for any person . . . to contract for sale of goods . . ." Criminal sanctions are imposed for violation of the Sherman Act, but not for violation of the Clayton Act.*

Appellee successfully argued in the District Court that the legislative history of the Clayton Act should be ignored, on the authority of *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

While it may have been crystal clear in *Standard Fashion* that the contract there involved was a violation of the Clayton Act, I feel that it is not so apparent when applied to the contract here. The legislative history is important because it aids in the interpretation of the statute and reveals that Congress never intended the law to be applied to such a case as the one at bar.

In *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), the Court said:

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how "clear the words may appear on superficial examination."

Mr. Justice Holmes, in *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918), said:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances in which it is used.

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* The bill as it passed the House of Representatives contained criminal sanctions. These were eliminated in the Senate.

It has been well stated:

> The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence . . . Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning . . . To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time. Landis, *A Note on Statutory Interpretation.* 43 *Harvard L. Review* 886, 888, 889, 892.

[fol. 97] The evils sought to be remedied by the Clayton Act were set out in the reports of the Congressional committees, in the hearings before the committees and in the debates.[1]

The evils were declared to be exclusive or tying contracts made between manufacturer and dealer whereby the latter specifically agreed not to deal in the commodities of the seller's competitors and contracts tying non-patented articles to the sale of patented articles.

The legislative proceedings are all too clear that what Congress was aiming at was monopolistic practices of powerful sellers in the distribution of goods whereby the dealer or buyer was prohibited from dealing in the goods of the seller's competitors. The legislation was directed against sellers, not buyers, and was intended to curtail the monopolistic practices of the commercial and industrial giants of the day.

At the same time, the need was recognized for more effective legal relief to private parties injured by violation of the anti-trust laws. Private parties threatened by loss or damage from violation of the law were given the right to injunctive relief, and treble damage actions were facilitated by making judgment in a Government suit or prosecution prima facie evidence of the violation there established.

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[1] H. R. Rep. No. 627, 63rd Cong. 2nd Session (May 6, 1914); S. Report No. 698, 63rd Cong. 2nd Session (July 22, 1914); 51 Cong. Rec. 9406, 9407, 9160, 14226, 14270.

Despite these efforts to aid private parties, no action was taken to incorporate the provisions of pending bills which would have authorized broad application of the defense that the plaintiff in a civil action had violated the anti-trust laws. Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. R. 507, 551.

Annexation of the illegality defense to the statute by implication either as an inference of unexpressed intention of Congress or as the result of some doctrine of common law, would be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. Cf. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 752 (1947).

The buyer was a privately owned public utility engaged in the production and sale of electricity. It served the City of Tampa and surrounding communities. It operated under franchise from the State of Florida and was regulated by public authority. Its rates were fixed by the [fol. 98] Public Utility Commission of Florida. It was a monopoly operating under legal sanction.

While this did not give Tampa license to violate the anti-trust laws, *Pennslyvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (C. A. 4, 1950), cert. denied 340 U. S. 906 (1950), nevertheless, its needs and requirements as a regulated public utility, which were materially different from those of private industry, are factors that must be considered in determining the propriety of the contract in the present case. As was stated by the Court of Appeals for the District of Columbia in *Pennsylvania Water & Power Company* v. *Federal Trade Commission*, 193 F. 2d 230, 234 (C. A. D. C., 1951), aff'd 343 U. S. 414 (1952), "the anti-trust laws can have only limited application to industries regulated by specific statutes." The Court observed that laws aimed at combatting monopolistic practices must be applied somewhat differently to those industries which are of themselves monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business.

The buyer was under obligation to the public to furnish a continuous supply of electricity at rates fixed by the

public utilities commission. To meet these obligations it was not only desirable, but absolutely necessary that it be supplied with the boiler fuel to make the electricity. Its rates could not be fixed for any appreciable length of time if it were required to depend upon a fluctuating market price for boiler fuel. It would certainly not be in the public interest to require a utility to purchase boiler fuel on short term contracts or on the open market so that every time there was a shift in the market price, the utility's rates to the public would have to be adjusted.

It is fairly inferable from the record that a rise in the market price of coal took place subsequent to the date of the contract and prior to the time for commencement of deliveries thereunder because, after the seller's repudiation, the buyer had to pay a substantially higher price than the contract price for its requirements of coal. The contract, however, contained an "escalator clause" to take effect upon the commencement of the contract in 1957 providing for adjustments based on the average weekly gross earnings of production workers in manufacturing industry. [fol. 99] The fact that the buyer was required to pay a substantially higher price for coal after the seller's repudiation demonstrates the wisdom of having an enforceable contract. Having such a contract would not only fix the price of coal, but also ensure the continuity of supply. In order to take care of the requirements of its customers, which undoubtedly involved seasonal low and peak loads, a requirements contract seemed best adapted for Tampa's needs. The contract contained a provision for adjustment of any gross inequity that could result from the economic conditions not contemplated by the parties, which was to be corrected by agreement or arbitration.

In the case of *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353 (1931), the contract in suit called for the largest consumer of gas in Fort Smith, Arkansas to take all its requirements from one company, which amounted to a million to a million and a half cubic feet per day. The pipe line company sued for specific performance of the contract. The contract in question had no time limit, but the consumer did have the option to purchase other gas if the gas company could not deliver

an adequate supply. Although the defense interposed was that the contract was contrary to the public policy and laws of Arkansas, the considerations involved were that the contract was illegal because "it [was] in restraint of trade, tends to the monopolization at Ft. Smith of the sale of gas by the pipe line company, and is an undue restraint of business competition between companies supplying gas." 39 F. 2d 408, 409. The Court of Appeals held the contract to be illegal. 39 F. 2d 408 (C. A. 8). The Supreme Court reversed, and entered judgment for the plaintiff. In so doing the Court stated:

> . . . The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade.
>
> The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms. 283 U. S. 353, 358.

In the case of *In the Matter of Houston Texas Gas & Oil Corp.*, 16 F. P. C. 118 (1956), the Federal Power Commission approved a 20 year requirements contract under which gas would be brought into Florida to compete with [fol. 100] oil. Its approval was conditioned on elimination of cancellation provisions. The Court of Appeals affirmed in *Florida Economic Advisory Council* v. *Federal Power Commission*, 254 F. 2d 643 (C. A. D. C., 1957), cert. denied 356 U. S. 959 (1958), stating: "... The injury to petitioner [the oil concerns] is that it must share what has heretofore amounted to a power monopoly," id., 649. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

The long term of this contract (20 years) and the fact that over the years it involved a large amount of coal were factors taken into account by the majority in holding it illegal. The business of the buyer required it to use large quantities of boiler fuel. Yet as compared with oil, only two units were using coal whereas eleven units were burning oil.

Prior to the seller's repudiation of the contract, Tampa, in reliance on the contract, had made a capital expenditure of $3,000,000 more than would have been required for oil burning equipment. The seller had also expended $7,500,000 in order to place itself in position to perform the contract. It is, of course, unfortunate for both parties that the seller did not discover that it had violated the law until after these large capital expenditures had been made. Assuming that each entered into the contract with the profit motive in mind, I do not think that 20 years was an unreasonable length of time in which to amortize, out of profits, these large capital expenditures.

It is my firm conviction that, read in the light of its legislative history, the Clayton Act was never intended to vitiate a requirements contract made by a single public utility to ensure a continuing supply of boiler fuels at a constant price. Such a contract is not only an economic necessity in circumstances such as these, but also serves the best interest of the public, who in the long run must shoulder the burden of increased costs of the utility. The holding in the *Twin City* case, supra, and the insistence upon such a contract by an agency of the United States in the *Houston Texas Gas & Oil* proceedings, supra, only serves to substantiate that opinion.

Even if the view is taken that the Clayton Act is applicable to the contract in suit, I feel that no violation thereof has been established.

[fol. 101] In order for the contract of sale to violate the Clayton Act two elements must be proven. First, that the contract was "*on the condition, agreement or understanding* that the . . . purchaser . . . shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor . . . of . . . seller." Second, the effect must be to substantially lessen competition or create a monopoly in any line of commerce (Emphasis added.)

No such condition was embodied in the written contract either expressly or by fair implication. All that the contract provided was for the supply of the buyer's total requirements *for the first two coal burning units to* be in-

[1] Title 15 U. S. C. § 14.

stalled at the Gannon Station and for any others built there *during the first ten years* of the contract. Eleven existing units were burning oil. The buyer was free to convert all of its oil burning units to coal burning units and purchase its coal therefor from anyone it chose. Such possible conversion is not as remote as was claimed. In an affidavit of Tampa's president, it is stated that conversion of other units is presently being considered. The buyer was also free to erect new coal burning units at any place other than at Gannon Station, and after ten years at the Gannon Station, and buy its coal from any one. The buyer also had the option at the Gannon Station to reduce the quantity of coal by 15% if it desired to use the by-product of a local supplier.

Since the contract contained no such condition, agreement or understanding as the Clayton Act proscribes, the Act had no application to the present case. But the seller claims that any "requirements" contract comes within the purview of the Clayton Act. I do not agree. A requirements contract could not come within the scope of the Act unless in effect it prohibited the buyer from dealing in the goods of any one else and operated substantially to lessen competition or create a monopoly. If the contract was to purchase only part of the buyer's requirements and he is free to purchase the remainder elsewhere, no violation of the statute occurs.

Looking at the actualities of the case, the buyer was not a dealer in coal or oil. It consumed both in making electricity which it sold to the public. In the very real sense, [fol. 102] coal and oil were competitive fuels and the buyer was using both. Eleven of its units were oil burning and only two were to be coal burning. Prior to the construction of the coal burning units at its Gannon Station the buyer used only oil. In fact, on account of the contract in question coal for the first time broke into the Florida utility market which theretofore had been heavily blanketed by large oil companies.

The fact that the contract provided for the buyer's requirements at the two units of the Gannon Station did not bring the contract within the scope of the Clayton Act because it did not foreclose the buyer from using coal in

other plants or dealing with the seller's competitors elsewhere.

It must be remembered that at the time of the contract the Gannon Station had not been erected. The contract provided for something to be done in the future. It did not limit Tampa in converting or constructing other coal units anywhere or purchasing coal from anyone except for use at the Gannon Station. The buyer had no interest in creating a monopoly of coal in the seller.

But even if the contract could be construed as requiring the buyer to take all its requirements of coal from seller, under the facts and circumstances of this case, there was no violation of the law.

Of importance in this regard is the holding that, in the circumstances of this case, coal constitutes a "line of commerce." The coal was purchased by Tampa as a source of power for its generators, not for resale to ultimate consumers. It was to be used as a boiler fuel.

The record shows that the Atomic Energy Commission has approved the application of Tampa to build an atomic reactor. It is planned that electricity generated from fissionable fuel will be on its lines by 1964. In order to induce Tampa not to convert its other boilers from oil to coal the oil companies have offered to reduce the price of oil.

It is my conviction that the line of commerce in which these parties were dealing was boiler fuels, not just coal. If the line of commerce is boiler fuel generally, then this contract could not come within the purview of Section 3 of the Clayton Act, as Tampa was certainly free to purchase boiler fuels, other than coal, from whoever it chose. [fol. 103] The standard to be applied in determining what constitutes a line of commerce is derived from three recent Supreme Court decisions, *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957), and *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

In the *International Boxing Club* case the question presented was whether championship boxing contests were distinct from all professional boxing events. The Supreme Court held they were.

In the 1957 *du Pont* case the question presented was whether automotive fabrics and finishes were distinct from all other fabrics and finishes. The Supreme Court held they were.

In the 1956 *du Pont* case the question presented was whether cellophane was distinct from all other flexible packaging materials. The Supreme Court held it was not.

In each of those cases the test applied was constant, while the results differed. The test was enunciated in the *du Pont* cellophane decision (351 U. S. 377):

> Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. (at p. 393)
>
> What is called for is an appraisal of the "cross-elasticity" of demand in the trade. See Note, 54 Col. L. Rev. 580.
>
> The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal. (at pp. 394-5)
>
> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. (at p. 400)
>
> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests [fol. 104] are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. (at p. 404)

With the basic criteria in mind, the three decisions are easily reconciled. As was developed in extensive findings of fact in the *du Pont* cellophane case, a variety of prod-

ucts are wrapped in both cellophane and several other flexible packaging materials. More simply, a loaf of bread can be wrapped with equal facility in cellophane, wax paper, etc. They are interchangeable. On the other hand, a car cannot be painted with house paint and vice versa. Hence, the result in the 1957 *du Pont litigation*. As to the *International Boxing Club* decision, the Court found that, in public appeal, championship fights exert a different drawing power than do other boxing matches. The decaying status of professional boxing in the United States attests to that fact, as it is only the occasional "glamour" fight which is able to create even a ripple of public enthusiasm.

It is interesting to note though, that in each of the decisions the line of commerce was of such scope as to include sub-divisions within it. The general classification of championship fights covers bouts in each weight class; automotive finishes and fabrics have many variations; the diversity of flexible packaging materials considered is clearly seen in the Court's opinion in the *du Pont* cellophane case.

An excellent analysis of the proper application of the "line of commerce" test is found in *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (D. C. S. D. N. Y., 1957) probable jurs. noted 355 U. S. 937, 951, judgments vacated for consideration of United States' motion to dismiss 358 U. S. 915 (1958). In that action it was alleged that certain French manufacturers and American distributors of perfumes had registered the trade-marks of various perfumes in the name of the American distributors in order to monopolize the American market for those brands. The Court heard evidence that many perfume manufacturers were able to virtually duplicate the fragrances of their competitors and that the average person would not distinguish between the two scents. On the other hand, it was shown that in fact the most important element in successful marketing of name brand perfumes is the establish-
[fol. 105] ment of a demand for the name, rather than the odor. The Court concluded:

> Objectively, the products may be more than reasonably interchangeable with others. But the lack of

> objectivity in consumer demand impairs the basis of interchangeability and negates a finding of cross-elasticity.

The Court distinguished that situation, wherein consumer demand is for a name, with the motives of the manufacturers in the *du Pont* cellophane case, who:

> Were guided by careful and objective considerations of utility and price. . . . Thus, small variations in price or quality would induce a manufacturer to shift from one flexible packaging material to another, in accordance with a balance of all the utilities toward the achievement of the most efficient economic operation.

A converse holding, based on the interchangeability test, is found in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y., 1957) aff'd 259 F. 2d 524 (C. A. 2, 1958). There the court held refined sugar generally to be a line of commerce, whereas it had been contended that cane sugar and beet sugar were separate lines. This finding was upheld in the Court of Appeals, which noted that the two types of sugar are functionally interchangeable, notwithstanding the fact that cane sugar sells at a higher price than beet sugar, and that cane sugar has a greater public acceptance. A factor emphasized by the Court of Appeals was the sensitivity of the two types of sugar to price changes by one another.

Where does coal, as a boiler fuel, fit into this pattern? The Supreme Court has taken judicial notice of the competitive nature of fuels generally. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 72 (1935). This should be some indication that boiler fuels as a class are a line of commerce.

Application of the interchangeability test convinces me that there exists such a degree of cross-elasticity between coal and other boiler fuels as to constitute boiler fuels the relevant line of commerce in this case. Each of the boiler fuels—coals, oil, gas and atomic energy—is utilized in the same manner to produce the same result. As each

is consumed power is produced to drive the generators [fol. 106] which in turn produce electric energy. The public demand being satisfied is for electric energy and the boiler fuel being utilized in the production thereof is not a material factor influencing the consumers' market.

What is presented here is the instance of a producer guided by careful and objective considerations of utility and price striving to achieve the most efficient economic operation, as in the *du Pont* case, rather than an instance of a non-objective consumer market, as in the *Guerlain* case. It is clear from this record that Tampa is basically concerned with factors of economic utility in its operation, as it is considering conversion of other oil burning units and expansion into the field of atomic energy as a source of power. Such decisions are motivated by a desire to render the best possible service at the lowest practical rates, while realizing a reasonable profit.

The factor of price sensitivity is also present in this case. Following the initial use of coal by Tampa its oil suppliers offered to reduce prices in order to meet the challenge of the new fuel.

I find that coal, oil, gas and atomic energy meet the interchangeability test and are components of the general line of boiler fuels. This contract, relating only to coal, cannot establish a monopoly in a "line of commerce" within the meaning of the Clayton Act, and accordingly cannot be violative thereof.

Even if coal is deemed to be the relevant line of commerce that alone does not establish a violation of the Clayton Act by this contract. In order that a requirements contract come within the terms of the Act its effect must be "to substantially lessen competition or tend to create a monopoly in any line of commerce." Requirements contracts are not per se illegal. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 524 (1948); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 728-9 (1944). Cf. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Beloit Culligan Soft Water Co.* v. *Culligan, Inc.*, . . . F. 2d . . . (C. A. 7, 1959). This fact was tacitly admitted in the *Standard Oil* decision, when it was recognized that:

> Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers and thus indirectly of advantage to the consuming public. 337 U. S. 293, 306.

[fol. 107] See dissenting opinion of Justice Frankfurter in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 402 (1953).

What were the actual monopolistic consequences of this single contract? At the time it was entered into, in the entire State of Florida only 792,000 tons of coal were being consumed annually. It was conceded that within a short period of time the Gannon Station would be using amounts in excess of that to satisfy its requirements.

Looking only at those two figures the contract would appear, in fact, to have created a situation of monopoly in favor of the seller in Florida. However, it was also conceded that as a result of this contract Tampa became the only substantial consumer of coal in Florida. Further, at the time the contract was entered into coal accounted for less than 6% of the fuel consumed in the entire State of Florida, and every power-generating unit in Peninsular Florida burned oil in its boilers.

Tampa services an area of approximately 1,700 square miles covering only 3% of the total land area of Florida. Within that area resides approximately 11% of Florida's population.

Any monopoly which seller enjoys extends only to that area serviced by Tampa. Competition has not been foreclosed by this contract for the coal business of the utilities serving the remaining 97% of the state embracing the 89% of the population residing therein. I do not consider this evidence to fall within the area of economic inquiry rejected as irrelevant by the Supreme Court in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949). In that case it was urged that in fact competition had flourished as a result of the contracts under attack. The Court said that in light of the fact that Standard Oil had 8,000 exclusive dealing contracts with 16% of the retail outlets selling 6.7% of all gasoline in a seven state area such evidence could not overcome the natural ten-

dency of the contracts to substantially lessen competition and should not be considered. That situation is so far removed from the one at bar that I cannot consider the holding to militate against consideration of the market left free for competition after this contract.

It may be contended that this circumstance is too speculative and founded upon a mere possibility that other utilities may convert to the use of coal. In answer to that [fol. 108] it need only be observed that prior to this contract Tampa was not a coal consumer, but that it made the change. It is not unreasonable that now, once coal in any significant quantity has been introduced into the Florida market, other utilities may follow suit. They are a presently existing potential market. The choice of conversion is up to them, as it was to Tampa, prodded perhaps by sales promotion on the part of coal companies wishing to acquire their business.

I cannot consider a single contract with a single utility serving only 3% of the land area and 11% of the population of a single state as "substantially lessening competition or tending to create a monopoly." The remainder of the utilities throughout the state are a potential market for free competition. If they choose not to deal in the commodity covered by the contract, for reasons of their own, that should not operate to invalidate the one contract already entered into.

Any contract of sale, to some degree, lessens competition, as it takes the particular buyer out of the competitive market for the commodity contracted for. But the Clayton Act requires more than that—the lessening must be substantial, and substantiality is lacking where 89% of the potential consumers of a product in a state are free to deal among all who sell it. Cf. *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment, Inc.*, 73 F. 2d 725 (C. A. 7, 1934), cert. denied 294 U. S. 706 (1935).

Appellee has not cited any authority in which a single contract of such limited application as that under consideration has been held to violate the anti-trust laws. Indeed, in the prior decisions either or both of two elements, each of which is absent herein, existed.

This contract in no way resembles the so-called "tying agreements" where the owner of a patented product attempts to extend his patent monopoly by requiring the buyer to purchase non-patented articles also, *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines* v. *United States*, 298 U. S. 131 (1936); *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 257 (C. A. 6, 1936); *Radio Corp. of America* v. *Lord*, 28 F. 2d 257 (C. A. 3, 1928); *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978 (D. C. N. D., Ill., 1949); or where the seller had such market domination over a non-patented article as to be able to require the purchase [fol. 109] of a "tied" product with it. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (C. A. 1, 1945), cert. denied 326 U. S. 776 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48 (C. A. 4, 1942); *United States* v. *American Can Co.*, 87 F. Supp. 18 (D. C. S. D. Cal., 1949).

Those cases not involving tying agreements had the other principal element not found here—an actual monopoly in the relevant market. In *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the seller controlled 40% of the nations 52,000 pattern agencies by exclusive contract. In *Fashion Originator's Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941), the manufacturers comprising the Guild sold 38% of all women's garments wholesaling at $6.75 and up and more than 60% of those at $10.75 and up. *Dictograph Products Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (C. A. 2, 1954), cert. denied 349 U. S. 940 (1955), involved exclusive dealing contracts tying up approximately 22% of the nation's 1,000 hearing aid distributors. The seller in *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (C. A. 7, 1954), had exclusive dealing contracts with 16 wholesalers including the two largest in Illinois and Iowa, which were the two largest markets for its products. While not indicating the total amounts and percentages of business involved the Court did note that *one* of Anchor's 32 competitors had made over $500,000 in sales to the Illinois and Iowa wholesalers over a three year period, which business

it lost as a result of the exclusive dealing contracts of the seller. The Pullman Co., *United States* v. *Pullman Company*, 50 F. Supp. 123 (D. C. E. D. Pa., 1943), was the sole supplier in the United States of railroad sleeping cars and car service, and had maintained that position partially by the use of exclusive dealing contracts.

Only in *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949), and *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (D. C. S. D. Cal., 1951), aff'd 343 U. S. 922 (1952), was the enormity of the seller's position in the market such as to be considered less than dominant. But even those cases present a situation much more aggravated than herein. In the *Standard Oil* case the seller had 8,000 exclusive dealing contracts with 16% of the independent service stations in a seven state area, although [fol. 110] their sales constituted only 6.7% of the total gasoline sold. Furthermore, Standard's total sales constituted 23% of all the gasoline sold in the market. It was found in *Richfield* that 7,546 oral and written exclusive dealing contracts had been made by seller covering operations in six states and involving $43,173,000 in sales for the year 1950 alone.

Richfield was affirmed by the Supreme Court on the authority of *Standard Oil*. In this regard, it is important to note the interpretation of the *Standard Oil* decision by Justice Frankfurter, who wrote the opinion:

> In any event, in the Standard Oil case, we recognized the discrepancy in bargaining power [between seller and buyer] and pointed out that retailers might still insist on exclusive contracts if they wanted. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, dissent at 402.

The importance of disparity in bargaining power in antitrust cases has been recognized by the Supreme Court. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 394, 611 (1953).

There was no inequality of bargaining power in this case. The seller was but one of 700 coal producers capable of serving the buyer, and was not shown to be of such size as to be capable of any economic coercion. The buyer

has not been shown to have been capable of exerting any unreasonable demands in its own behalf. For all that appears, the contract was freely negotiated, and a fair reading of it gives one the impression that it was equitable to both parties in all material regards.

The seller would have the Court impose extra-judicial sanctions not provided by Congress to relieve it of its contractual obligations. If this is permitted without the utmost caution, the door may open wide to inconsequential allegations of anti-trust violations in every action on a contract of any substantial magnitude. While this might be good for anti-trust lawyers, it is doubtful whether it would be of much benefit to anyone else. It would certainly have a tendency to clog the courts with protracted litigation. Although this might put an end to anti-trust violations, it could, as Justice Jackson pointed out in *Bruce's Juices*,[9] have a devastating effect upon all business.

I would reverse the decision below.

[fol. 111] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 112]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[9] 330 U. S. 743, 754 (1947).